MICHAEL D. NASATIR
LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303
JERALD W. NEWTON, of Newton, Re & Russell, 8383 Wilshire Boulevard, #510 Beverly Hills, CA 90211 655-5011

Attorneys for Petitioner

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

JOHN LEE BOWEN, Petitioner, vs. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	Case No. 73 - 6848 (Undocketed) (Ninth Circuit Court of Appeals No. 72-1012) PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

This is a Petition of JOHN LEE BOWEN for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Ninth Circuit on May 9, 1974, refusing to make the rule enunciated on that date prohibiting checkpoint searches away from the border without probable cause in Petitioner's case applicable to Petitioner. The United States Court of Appeals for the Ninth Circuit established the fixed checkpoint rule in Part I of its Opinion, and this ruling is not questioned by Petitioner herein. Petitioneris specifically petitioning for certiorari to challenge the failure of the Ninth Circuit to apply the rule enunciated in Petitioner's case to Petitioner himself.

On October 7, 1971, BOWEN was sentenced to seven years imprisonment for violation of Title 21, U.S.C. §§176(a) and 331(q)

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

(3)(b). On June 16, 1972, the United States Court of Appeals for the Ninth Circuit affirmed BOWEN'S conviction and on July 24, 1972, BOWEN'S Petition for Rehearing en Banc was denied. On June 25, 1973, this Honorable Court granted Petitioner leave to proceed in forma pauperis, vacated the Opinion of the United States Court of Appeals for the Ninth Circuit, and remanded the cause back to said Court for further consideration. United States v. Bowen, 413 U.S. 915, 93 S.Ct. 3069 (1973). On October 23, 1973, the United States Court of Appeals for the Ninth Circuit voted to hold an en banc hearing on Petitioner's cause and on May 9, 1974, the Court held, in Part II of its Opinion, that Petitioner BOWEN was not entitled to relief from the search determined to be unconstitutional in Part I of the Opinion.

OPINIONS BELOW

To Petitioner's knowledge there are no official or unofficial reports of the Order of the District Court denying BOWEN'S Motion to Suppress Evidence. The original opinion of of the United States Court of Appeals for the Ninth Circuit is reported at 462 F.2d 347 (9th Cir. 1972). The opinion of this Honorable Court granting certiorari, granting leave to proceed in forma pauperis and remanding to the Ninth Circuit in light of Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2533 (1973), is reported at 413 U.S. 915, 93 S.Ct. 3069 (1973). To Petitioner's knowledge the en banc decision of the United States Court of Appeals for the Ninth Circuit, on remand, has not been officially or unofficially reported as yet. (A copy of said Opinion is attached hereto as Appendix "A".)

JURISDICTION

1. Petitioner was arrested on January 19, 1971, and a three count Indictment was returned against him on January 27, 1971, charging him with violations of Title 21, U.S.C. §§176(a) and 331(])(3)(b).

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NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

2. On August 23, 1971, Petitioner's Motion to Suppress Evidence in connection with the instant cause was denied. On August 27, 1971, BOWEN'S jury trial commenced and on August 31, 1971, BOWEN was found guilty as charged in all three counts of the Indictment. On October 7, 1973, BOWEN was sentenced to seven years imprisonment. A timely Notice of Appeal was filed with the Ninth Circuit.

3. On June 16, 1972, the United States Court of Appeals for the Ninth Circuit affirmed BOWEN'S conviction, and on July 24, 1972, BOWEN'S Petition for Rehearing en Banc was denied by said Court. A Petition for Writ of Certiorari and Request for Leave to Proceed in Forma Pauperis were prepared and filed with the United States Supreme Court.

4. On June 25, 1973, the United States Supreme Court granted Petitioner leave to proceed in forma pauperis, vacated the previous Opinion of the United States Court of Appeals for the Ninth Circuit and remanded the cause back to the Ninth Circuit for further consideration in light of Almeida-Sanchez, supra.

5. On October 23, 1973, the United States Court of Appeals for the Ninth Circuit voted to hold an en banc hearing on Petitioner's case. On May 9, 1974, said Court held that fixed checkpoint searches, away from the border, not located at the functional equivalent of a border, without probable cause, violated the Fourth Amendment to the United States Constitution. However, the Court of Appeals further held that Petitioner was not entitled to the benefits of said ruling as said ruling was made retroactive only until June 21, 1973, the date of this Court's rule on Almeida-Sanchez, supra. Petitioner's Petition for Certiorari is only directed to the retroactivity portion of said Opinion.

6. No rehearing was requested in the United States Court of Appeals for the Ninth Circuit in connection with the

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

ruling on retroactivity and no orders were requested granting an extension of time within which to file the Petition for Certiorari.

7. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the constitutional principles reaffirmed in Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2533 (1973), and in United States v. Bowen, ___ F.2d ___ (9th Cir. 1974), should be applied to Petitioner JOHN LEE BOWEN who has challenged the validity of the instant seizure at all applicable judicial proceedings, and whose case was pending before this Honorable Court on the date that Almeida-Sanchez, supra, was decided. Specifically:

A. Whether Petitioner BOWEN should be entitled to the fruits of his appeal from the United States District Court for the Central District of California, to the United States Court of Appeals for the Ninth Circuit, to the United States Supreme Court, and then back to the United States Court of Appeals for the Ninth Circuit, where established fundamental constitutional principles were applied to the specific facts of his case and a determination was made that his contentions that a warrantless checkpoint search away from the border, without probable cause, was correct;

B. Whether the decision in United States v. Bowen, ___ F.2d ___ (9th Cir. 1974), must be applied to Mr. BOWEN himself so that the Opinion of the Court is not "mere dictum" and so that the "case or controversy" requirement of Article III of the Constitution would be followed; and

C. Whether the United States Court of Appeals for the Ninth Circuit can refuse to retroactively apply

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

Almeida-Sanchez v. United States, supra, to Petitioner when Almeida-Sanchez, supra, did not "make new law," was itself based on fundamental constitutional law, and did not overrule any previous determination of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

See Appendix "B."

STATEMENT OF THE FACTS

The Indictment charged BOWEN with violations of Title 21, U.S.C. §176(a) and Title 21, U.S.C. §331(q)(b). Count 1 charged BOWEN with smuggling marijuana; Count 2 charged concealment and transportation of that marijuana; and Count 3 charged BOWEN with possession of stimulant drugs.

BOWEN was stopped at a checkpoint sixty (60) miles from the Mexican border. There was no showing that BOWEN had been in Mexico that day, or any day. BOWEN'S vehicle did not look unusual or suspicious. It was "routinely" searched for aliens. The search of BOWEN'S vehicle, a "camper," revealed the presence of marijuana.

Counsel for BOWEN argued during a pre-trial Motion to Suppress and at trial that the search of the vehicle could not be justified as an "alien search" when it was conducted 60 miles from the Mexican border without any showing of probable cause. The trial court denied BOWEN's Motion to Suppress, Motion to Dismiss, and Motion for Judgement of Acquittal. The United States Court of Appeals for the Ninth Circuit affirmed BOWEN'S conviction; the United States Supreme Court vacated said decision and remanded to the United States Court of Appeals for the Ninth Circuit in light of Almeida-Sanchez, supra; the Ninth Circuit then held that a search at a fixed checkpoint which was not a functional equivalent of a border without probable cause was

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

illegal; however, said Court also held that Petitioner was not entitled to the benefit of said rule. The question of retroactivity of this rule is the only question Petitioner is bringing before this Honorable Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

In Almeida-Sanchez v. United States, supra, this Honorable Court held that a search of a vehicle without a warrant and without probable cause away from the border or the functional equivalent of the border, was in violation of the Fourth Amendment to the United States Constitution. In reaching this determination, the Court concluded that no prior decision of this Court provided the Government with a basis for concluding that a warrantless search in this situation would be justified. In fact, the Court stated that both the "administrative search cases" and the "car search" cases indicated that probable cause or a warrant, or both, were required before searches of this type could be conducted. Petitioner's case, which was before this Honorable Court at the time Almeida-Sanchez, supra, was decided, was remanded to the United States Court of Appeals for the Ninth Circuit for determination in light of Almeida-Sanchez, supra. Throughout all court proceedings, Petitioner has contended that the search of his vehicle without probable cause 60 miles from the United States/Mexican border was illegal. Respondents, relying upon decisions from the United States Courts of Appeal contended, in effect, that Title 8, U.S.C. §1357(a) and (c), and 8 C.F.R. §287.1(a)(2), overruled the established constitutional doctrine and allowed seizures of this type.

On remand the United States Court of Appeals for the Ninth Circuit in United States v. Bowen, supra, held that Petitioner was correct and that the search conducted against him was unconstitutional. However, in Part II of the Opinion the Court concluded that Petitioner was not entitled to the protection of

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

the rule that his case established. This was in direct contradiction to the rulings on retroactivity of Almeida-Sanchez, supra, by the Fifth Circuit in United States v. Byrd, 483 F.2d 1196 (5th Cir. 1973), and the Tenth Circuit in United States v. Maddox, 458 F.2d 361 (10th Cir. 1973), and United States v. King, 485 F. 2d 353 (10th Cir. 1973). This conflict should be resolved by this Court. The decision of the United States Court of Appeals for the Ninth Circuit is also in direct contravention to the "case or controversy" requirement of Article III of the Constitution since it reduces the Opinion in United States v. Bowen, supra, to "mere dictum."

Finally, the United States Court of Appeals for the Ninth Circuit established a new criterion for determining retroactivity. That Court held that a decision that consistently followed established constitutional law as articulated in opinions of this Honorable Court, should not be applied retroactively even though there were no prior decisions of this Honorable Court to indicate that a contrary result should be reached. Petitioner respectfully submits that this Honorable Court should take this opportunity to determine the constitutionality of this new retroactivity test proposed by the United States Court of Appeals for the Ninth Circuit and its application to Petitioner herein.

ARGUMENT A

THE CONSTITUTIONAL PRINCIPLES REAFFIRMED IN ALMEIDA-SANCHEZ, SUPRA, AND UNITED STATES V. BOWEN, SUPRA, SHOULD BE APPLIED TO PETITIONER, JOHN LEE BOWEN, WHO HAS CHALLENGED THE VALIDITY OF THE INSTANT SEIZURE AT ALL APPLICABLE JUDICIAL PROCEEDINGS INCLUDING THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA; THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (TWICE); AND THE UNITED STATES

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

SUPREME COURT (TWICE).

JOHN LEE BOWEN has challenged the validity of a fixed checkpoint search 60 miles away from the border from January 19, 1971, until the present. On May 9, 1974, the United States Court of Appeals for the Ninth Circuit in interpreting Almeida-Sanchez, supra, held that searches conducted at fixed checkpoints, away from the functional equivalent of a border, without probable cause, were unconstitutional. However, the benefits of said decision were not applied to Petitioner BOWEN himself. This is in direct contradiction with results reached by the United States Courts of Appeal for the Fifth and Tenth Circuits. In United States v. King, supra, in answer to a position similar to that adopted by the United States Court of Appeals for the Ninth Circuit, the Court held:

> "In our view, that argument has no application to one in King's position. King, like Almeida-Sanchez, challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and has pursued his challenge as well. And King now asks that he be given the same relief as has been afforded in Almeida-Sanchez. We agree." 485 F.2d at 359.

In United States v. Maddox, supra, the Court replied to a similar argument by emphasizing that the Appellant in that case, like Almeida-Sanchez, had challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and had continued to press that challenge throughout the proceedings:

> "And Maddox now asks that he be afforded the same relief as has been afforded in Almeida-Sanchez. We agree." 485 F.2d at 363.

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

In United States v. Byrd, supra, the Court concluded that an appellant who was in exactly the same position on appeal as Petitioner BOWEN was before the Ninth Circuit, should be afforded relief under the doctrine of Almeida-Sanchez. In that case, the Court did not even deem it necessary to comment on the obvious point that Petitioners such as Byrd and Bowen, whose cases were on appeal before the Supreme Court at the same time as Almeida-Sanchez, should be allowed relief.

In previous cases the United States Supreme Court has held Fourth Amendment decisions retroactive to cases pending on direct review at the time the decision was rendered. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889 (1964); Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229 (1963); Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963). To refuse to hold Almeida-Sanchez, supra, applicable to Petitioner BOWEN would be a grave injustice. At each and every stage of the proceedings Petitioner has contested the constitutionality of the search for, and seizure of, contraband in his camper. Petitioner anticipated the Almeida-Sanchez decision and exhausted every possible avenue to avail himself of his Fourth Amendment rights. It would be a terrible injustice to deny Petitioner the protection enunciated in Almeida-Sanchez, supra, in this instance. Petitioner is not a "Johnny-Come-Lately" who is trying to take advantage of a recent Supreme Court decision, he is an an individual who has demanded his rights at every stage of the proceedings against him. In this light it is important to ntoe that the search of Petitioner's vehicle took place on January 19, 1971. Neither the decision in the Supreme Court nor the decision in the United States Court of Appeals for the Ninth Circuit in Almeida-Sanchez, supra, gives the date for the seizure of that matter. However, Petitioner is of the belief that the search in Almeida-Sanchez took place prior to January 19, 1971. It would be an anomaly to say that Almeida-

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 910
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

Sanchez, who was searched prior to Petitioner, could have the evidence introduced against him suppressed, while Petitioner, who was searched at a later date, and who pursued the same avenues as Almeida-Sanchez, could not.

ARGUMENT B

THE HOLDING IN UNITED STATES V. BOWEN, SUPRA, MUST BE APPLIED TO PETITIONER BOWEN HIMSELF FOR THAT DECISION TO MEET THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

Throughout the proceedings in the lower federal courts and before this Honorable Court, Petitioner BOWEN has contended that a search at a fixed checkpoint away from the functional equivalent of a border, without probable cause or warrant, is unconstitutional. The United States Court of Appeals for the Ninth Circuit, on May 9, 1974, concluded that Petitioner BOWEN was correct in his argument. However, that Court refused to apply the rationale of that decision to Petitioner BOWEN himself. This refusal was in direct violation of the "case or controversy" requirement of Article III of the United States Constitution and, in effect, rendered the decision outlawing these checkpoint searches "mere dictum." This was established in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967), where the Court stated:

> "We have recognized that Wade and Gilbert are, therefore, the only victims at pre-trial confrontations in the absence of their counsel to have the beneif of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 910
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

> Article III of the Constitution that we resolve issues solely in concrete cases or controversies,[3] and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law,[4] militate against denying Wade and Gilbert the benefit of today's decisions." 87 S.Ct. at 1972. (Footnotes omitted) (Emphasis added)

See Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 1036 n. 24 (1969).

To allow the United States Court of Appeals for the Ninth Circuit to refuse to apply the rule established in United States v. Bowen, supra, to Petitioner BOWEN himself, would be to allow the United States Court of Appeals for the Ninth Circuit to effectively overrule this Court's repeated mandate that constitutional decisions be rendered only where there exists actual "cases or controversies."

ARGUMENT C

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN UNITED STATES V. BOWEN, SUPRA, MUST BE APPLIED TO PETITIONER BOWEN BECAUSE THERE WAS NO PREVIOUS DECISION OF THE UNITED STATES SUPREME COURT TO JUSTIFY A CONTRA RESULT; IN FACT, ALL DECISIONS BY THE SUPREME COURT WOULD INDICATE THAT THE SEARCH AGAINST PETITIONER BOWEN WAS, IN FACT, UNCONSTITUTIONAL.

In refusing to apply the rationale of United States v. Bowen, supra, to Petitioner, the United States Court of Appeals for the Ninth Circuit developed a new test for retroactivity. This test, in essence, states that if any lower court has pre-

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 310
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

viously held contra to a recent Supreme Court decision, said lower court does not have to apply the recent United States Supreme Court decision retroactively. As can be seen in the factual situation of Petitioner, this test is absurd. Prior to this Honorable Court's decision in Almeida-Sanchez, supra, this Court had held that searches of automobiles without probable cause,[1] and administrative searches without warrant,[2] were unconstitutional. It would seem obvious that the lower courts would recognize that these constitutional principles could not be changed by statute, administrative regulation, or lower court rulings.[3] United States v. Arizona, 400 U.S. 112, 91 S.Ct. 2060 (1970); Marbury v. Madison, 1 Cranch 137, 178, 180 (1803).

The end result of this disregard for decisions from this Honorable Court by the lower courts was the so-called "alien exception" to the Fourth Amendment. As previously stated, this exception was in direct conflict with this Honorable Court's prior decisions and, in effect, placed the lower state and federal courts in a position "above the law." To allow the lower courts to refuse to retroactively apply the principles reaffirmed in Almeida-Sanchez, supra, and explicitly defined in United States v. Bowen, supra, to Petitioner BOWEN would be tantamount to this

1/ Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302 (1949); Husty v. United States, 282 U.S. 694, 51 S.Ct. 240 (1931); and Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925).

2/ Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727; See v. City of Seattle, 387 U.S. 541, 87 S.Ct. ____.

3/ See United States v. Elder, 425 F.2d 1002 (9th Cir. 1970); Barba-Reyes v. United States, 387 F.2d 91, 92-93 (9th Cir. 1967); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); Contrearas v. United States, 291 F.2d 63 (9th Cir. 1963); Title 8, U.S.C. §1357(a) and (c); and 8 C.F.R. §287.1(a)(2).

* * *

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LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 310
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

Court condoning lawless behavior by Government officials and the lower echelons of the judiciary.

This type of retroactivity test could go a long way in emasculating the power of the Supreme Court to render a final decision in conflicts between the decisions of the United States Courts of Appeal. For example, if the Ninth Circuit held that warrantless border searches were constitutional and the Fifth Circuit held that warrantless border searches were unconstitutional, a subsequent decision by this Court that warrantless border searches were in fact unconstitutional, would disallow all Fifth Circuit border searches without a warrant, but it would allow all Ninth Circuit searches up until the date of the Supreme Court's decision. A retroactivity rule that would yield this result would turn the present "confusion" on retroactivity into "chaos."

CONCLUSION

For the above-mentioned reasons, Petitioner JOHN LEE BOWEN respectfully requests that this Honorable Court apply the underlying rule of law in United States v. Bowen, supra, to Petitioner BOWEN.

DATED: June 6, 1974

Respectfully submitted,

MICHAEL D. NASATIR, of Nasatir, Sherman & Hirsch, Attorneys for Petitioner BOWEN

JERALD W. NEWTON, of Newton, Re & Russell, Attorneys for Petitioner BOWEN

FILED
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- JOHN LEE BOWEN, Defendant-Appellant.	No. 72-1012

Appeal From the United States District Court
For the Southern District of California

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE and SNEED, Circuit Judges

PER CURIAM:

This appeal is before the court upon the remand of the Supreme Court, Bowen v. United States, 413 U.S. 915 (1973), vacating 462 F.2d 347 (9th Cir. 1972).

Bowen was convicted of smuggling and transporting marijuana and of possessing depressant and stimulant drugs. The evidence of the violations was discovered during a routine search for illegal aliens of a camper truck at a permanent border-patrol checkpoint on California State Highway 86 approximately 36 air miles and 49 highway miles north of the Mexican border. Highway 86 is a principal route from Mexicali to Los Angeles by way of Indio and Riverside.

On June 21, 1973, the Supreme Court held in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), rev'g 452 F.2d 459 (9th Cir. 1971), that border-patrol agents on roving patrol cannot stop and search cars pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1 without probable cause or warrant.

Two separate issues are presented here: (1) How does Almeida-Sanchez affect searches conducted at a fixed checkpoint? (2) If fixed-checkpoint searches, as well as roving-patrol searches, are included within the ambit of the Almeida-Sanchez ruling, should that ruling be applied to fixed-checkpoint searches conducted by border-patrol agents prior to June 21, 1973, in cases pending on appeal on that date?

For the reasons set forth in Part I of the opinion of the majority of the court here, we hold that the rule announced by the Supreme Court in Almeida-Sanchez does apply to searches at fixed checkpoints. However, for the reasons set forth in Part II, we also hold that Almeida-Sanchez will not be applied to fixed-checkpoint searches conducted prior to June 21, 1973.

The judgment of conviction is affirmed.

FPI-Sandstone
8-3-72-100M-9401

PART I

GOODWIN, Circuit Judge:

According to the Supreme Court in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the government has been conducting three types of alien searches pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1: (1) searches at "[p]ermanent checkpoints * * * maintained at certain nodal intersections"; (2) searches at "temporary checkpoints * * * established from time to time at various places"; and (3) searches carried out by "roving patrols." 413 U.S. at 268. The government argued in Almeida-Sanchez that all these searches conducted "within a reasonable distance from any external boundary," 8 U.S.C. § 1357(a)(3), could be considered border searches, and thus be carried out with neither a warrant nor probable cause. See Carroll v. United States, 267 U.S. 132, 154 (1925).

The search condemned in Almeida-Sanchez was of the "roving patrol" type. It was conducted 25 miles north of the Mexican border, on a California east-west highway that lies at all points at least 20 miles north of the border. 413 U.S. at 267-68, 273. The search of Bowen's camper, however, was a fixed-checkpoint search, a type of search reserved from the Almeida-Sanchez decision. The checkpoint, on California State Highway 86, was between the major population centers of the Imperial Valley and Indio.

The opinion[1] in Almeida-Sanchez, delivered by Mr. Justice Stewart, leaves little doubt that traditional Fourth Amendment standards apply to fixed-checkpoint searches as well as to roving-patrol searches. Early in the opinion, after listing the three types of surveillance conducted by the Border Patrol along inland roadways and

noting that the government argues that "[i]n all these operations * * * the agents are acting within the Constitution when they stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, and even without probable cause to believe the cars have made a border crossing," the Court stated that "[t]he only asserted justification for this extravagant license to search is § 287 of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357(a) * * * ." 413 U.S. at 268.

Moreover, the government in Almeida-Sanchez sought to justify roving-patrol searches on the basis of 8 U.S.C. § 1357(a)(3) and 8 C.F.R. § 287.1(a)(2). Here, the government seeks to justify the fixed-checkpoint search by reference to the same statute and regulation. But, when the Supreme Court held that this statute and regulation could not exempt searches carried out pursuant to them from traditional Fourth Amendment scrutiny, see 413 U.S. at 272, the government's statutory justification for fixed-checkpoint searches as well as for roving-patrol searches vanished.

Finally, at the very end of its opinion, 413 U.S. at 274-75, the Court quoted from Carroll v. United States as follows:

> " * * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * * ."
> 267 U.S. at 153-54.

It would be strange indeed for the Court to quote this language if it meant to leave intact the government's asserted right to establish fixed checkpoints anywhere within 100 miles of the border. Surely, searches at these checkpoints, like searches by roving patrols, have the effect of violating the "right to free passage without interruption or search" of "those lawfully within the country * * * ." Such searches, therefore, must meet constitutional standards regardless of their utility in carrying forward the difficult mission of the Border Patrol.

To be sure, Mr. Justice Powell in his concurrence and Mr. Justice White in his dissent both correctly pointed out that Almeida-Sanchez did not present a question of a fixed-checkpoint search. See 413 U.S. at 275-76, 288. Nonetheless, these disclaimers do not override clear indications in the opinion of the Court that any distinction between fixed and movable checkpoints will be meaningless unless the distinction can be based upon reasoned Fourth Amendment considerations.

The government argues that there are, in fact, significant constitutional differences between roving patrols and fixed checkpoints. First, since fixed checkpoints often involve a stop and inspection of every car passing through them, they provide much less opportunity for the unfettered discretion of the police officer that was condemned in Almeida-Sanchez. See 413 U.S. at 268. Second, being stopped on a lonely road at night in a sparsely populated part of the country (Almeida-Sanchez) is more burdensome to the traveler than a stop at an identified and lighted checkpoint (Bowen). The government contends once again that the Constitution does not forbid all

searches, but only "unreasonable" ones. In support of the validity of arguably "reasonable" fixed-checkpoint searches, the government cites a number of judicial decisions upholding roadblocks established for the purpose of checking drivers' licenses and registrations. See, e.g., United States v. Croft, 429 F.2d 884, 886 (10th Cir. 1970); People v. Washburn, 265 Cal. App. 2d 665, 71 Cal. Rptr. 577, 581 (2d Dist. 1968); State v. Smolen, 4 Conn. Cir. 385, 232 A.2d 339 (App. Div.), pet. for certification for appeal denied, 231 A.2d 283 (Conn. 1967), cert. denied, 389 U.S. 1044 (1968); State v. Severance, 108 N.H. 404, 237 A.2d 683 (1968).[2]

We agree with the government that a fixed-checkpoint search that does not entail significant delay is probably less offensive than a roving-patrol search. Being asked to stop at a fixed checkpoint is not frightening to a seasoned traveler. Being flagged over to the side of the road by a roving patrol might be traumatic. Also, an officer on roving patrol probably has more discretion in deciding which cars to stop than one stationed at a fixed checkpoint, although the difference might be less than the government contends. Since not all vehicles passing through a checkpoint are stopped, and since not all vehicles stopped are searched, the officer at the checkpoint still retains a good deal of discretion to "single out" some travelers for stops or intrusive searches.

Nonetheless, even conceding that a fixed-checkpoint search might be less of an imposition on domestic travelers than a roving-patrol search, we are able to find nothing in the opinion of the Court in Almeida-Sanchez which suspends Fourth Amendment standards in dealing with immigration searches at fixed checkpoints.

Moreover, the government's reliance on judicial decisions upholding automobile stops for the purpose of checking drivers' licenses is misplaced. Although the government has cited only roadblock stops, there is a parallel line of decisions upholding roving-patrol stops to check for valid license and registration. See, e.g., Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); State v. Ream, 19 Ariz. App. 131, 505 P.2d 569 (Div. 1, Dept. B, 1973); Leonard v. State, 496 S.W.2d 576 (Tex. Crim. 1973). In other cases, courts did not even find the fact that the stop may have been at a roadblock rather than incident to a roving patrol significant enough to mention. See, e.g., United States v. Lepinski, 460 F.2d 234, 237 (10th Cir. 1972); Myricks v. United States, 370 F.2d 901 (5th Cir.), pet. for cert. dismissed, 386 U.S. 1015 (1967). Hence, since this line of vehicle-registration-check decisions was as relevant in Almeida-Sanchez as here, we do not find these decisions to be an appropriate means for distinguishing Bowen's search from that of Almeida-Sanchez.

What is more, the rationale for the drivers'-license decisions will not support the government's position here. For example, in Lipton v. United States, supra, in which this court upheld a stop by a motorcycle police officer of a youth driving an automobile, we reasoned that there was no way for a police officer to determine that a driver had a valid license permitting him to operate a motor vehicle other than by stopping him and asking him to produce his license. We noted:

> " * * * A contrary holding would render unenforceable the State statute requiring that automobile drivers be licensed." 348 F.2d at 593.

We are not persuaded that laws prohibiting illegal immigration will be rendered similarly unenforceable should we deny to the government the power to stop and search automobiles, without probable cause or warrant, at fixed checkpoints.

We hold, then, that fixed-checkpoint searches, like roving-patrol searches, even though conducted within a "reasonable distance" from the border, are not necessarily exempt from the traditional Fourth Amendment requirement of a warrant or probable cause. This holding, however, merely shifts the focus of our inquiry. The opinion in Almeida-Sanchez does not require that a border search, to be constitutional, be at the border itself; rather, a legitimate border search may also be conducted "in certain circumstances" at the border's "functional equivalents." 413 U.S. at 272. The search conducted in the present case was obviously not at the border itself; nor was it at a "functional equivalent" of the border.

The "function" of a border checkpoint is to regulate border crossings. Thus, in attempting to clarify what would constitute a "functional equivalent" of the border, the Court in Almeida-Sanchez offered two examples:

> " * * * For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search." 413 U.S. at 272-73. (Emphasis added.)

These examples are then contrasted with the search conducted in Almeida-Sanchez:

> " * * * [T]he search of * * * [an] automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border, was of a wholly different sort * * * ." 413 U.S. at 273.[3]

In other words, if a search takes place at a location where virtually everyone searched has just come from the other side of ~~the border~~, the search is a functional equivalent of ~~a border~~ search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search. One need only contemplate the volume of domestic travel between Buffalo and Rochester, New York, to see why a checkpoint between those two cities could not be the functional equivalent of a border checkpoint even though the checkpoint could be less than twenty miles from an international border.

In addition to the two examples of a functional equivalent of a border search provided by the Court in Almeida-Sanchez, other examples may be drawn from two series of decisions of this court. Representative of the first line of authority is Alexander v. United States, 362 F.2d 379 (9th Cir.), cert. denied, 385 U.S. 977 (1966). In that case customs officials, acting upon a tip from an informer, placed the defendant's automobile under surveillance when it crossed the border, and kept it under almost continuous watch as it made suspicious movements through the streets of a border city. In holding that a subsequent search by customs officials was properly called a border search, the court stated:

> "Where * * * a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of

> the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was aboard the vehicle at the time of entry into the jurisdiction[4] of the United States * * * ." 362 F.2d at 382.

In a second line of our own cases, this court has treated a search north of the border as the equivalent of a border search, where it appeared with reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who had just crossed the border illegally. See, e.g., United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), cert. denied, 401 U.S. 947 (1971), in which this court held:

> " * * * [I]f customs agents are reasonably certain that parcels have been (a) smuggled across the border and (b) placed in a vehicle, whether the vehicle has itself crossed the border or not, they may stop and search the vehicle. Similarly, if agents are reasonably certain that a person has crossed the border illegally, and has then entered a vehicle on this side of the border, we think that they may stop and search the vehicle and person. They can assume that he may have brought something with him." 432 F.2d at 1323.[5]

In both of these pre-Almeida-Sanchez lines of Ninth Circuit authority, as well as in the two examples offered by the Supreme Court in Almeida-Sanchez, although the search was not conducted precisely at the border, it still was directly related to a recent entry from across a border. See United States v. Almeida-Sanchez, 452 F.2d at 463 (dissenting opinion of Browning, J.), rev'd, 413 U.S. 266 (1973).

It is clear that the search conducted in the present case lacks the vital connection between the vehicle stopped

and a reasonable certainty, or even a probability, that it or its contents had recently crossed an international border. The checkpoint was approximately 36 air miles and 49 highway miles north of the Mexican border. Several significant population centers and highways, including Interstate 8, a major east-west freeway that connects the Southwest with the West Coast, lie between the checkpoint and the border. Under these circumstances, border-patrol agents had no reason to believe that virtually all or even most of the cars passing through their checkpoint had recently, or ever, crossed the border. Moreover, there was neither the continuing surveillance from the border nor the dependable intelligence from other sources required to fit this case into the Alexander line of decisions; nor was there the reasonable certainty that the vehicle contained either recently smuggled goods or aliens required under the Weil line. See United States v. Petersen, 473 F.2d 874 (9th Cir. 1973); United States v. Mitchell, 472 F.2d 67, 68 n.1 (9th Cir. 1973). Hence, the record in this case clearly indicates that the search conducted was not the functional equivalent of a border search. Were the record more equivocal, we would not hesitate to remand the case to the district court for a determination of functional equivalency. Where the record is as clear as it is here, however, we see no need for a remand.[6]

As its last line of defense, the government argues that fixed-checkpoint searches, even if not the functional equivalent of border searches, should be upheld simply because they are urgently needed. The government's difficulty in detecting and repatriating illegal aliens along our southern boundary needs no new documentation here.

The short answer to this argument, however, is that necessity alone cannot override the Fourth Amendment's prohibition against unreasonable searches and seizures. A similar argument was made and rejected in Almeida-Sanchez itself. See 413 U.S. at 293 (dissenting opinion of White, J.). Mr. Justice Powell in his concurring opinion in Almeida-Sanchez suggested that warrants based on area-wide conditions could be employed to resolve the contending interests of law enforcement and Fourth Amendment safeguards. 413 U.S. at 275-85; see generally The Supreme Court - 1972 Term, 87 Harv. L. Rev. 55, 200-04 (1973). Since the government did not seek such a warrant in this case, we need not now express an opinion on a hypothetical search conducted pursuant to a judicial warrant authorizing searches for a limited time at a specific checkpoint. We refer to Mr. Justice Powell's opinion here merely to suggest to the government that procedures less offensive to the Fourth Amendment than judicially unapproved checkpoint searches might be devised and implemented to supplement its program for enforcing immigration laws.

Our conclusion that Almeida-Sanchez is as applicable to fixed-checkpoint searches as to roving-patrol searches is consistent with that reached by the Court of Appeals for the Fifth Circuit in United States v. Speed, 489 F.2d 478 (5th Cir. 1973). There, the court held that a border-patrol search at a temporary checkpoint on a north-south highway approximately 65 to 75 miles north of the Mexican border was neither a border search nor a functional equivalent of a border search and, hence, was unconstitutional. The court commented, "The distinction between a checkpoint and a roving patrol is not important." 489 F.2d at 480.

Likewise, the Court of Appeals for the Tenth Circuit has held that a warrantless search, without probable cause, of an automobile at the checkpoint at Truth or Consequences, New Mexico, violates the Fourth Amendment unless a search at that checkpoint could be deemed the functional equivalent of a border search. United States v. King, 485 F.2d F.2d 353 (10th Cir. 1973); United States v. Maddox, 485 F.2d 361 (10th Cir. 1973).

We hold here that under the rule announced by the Supreme Court in Almeida-Sanchez the search of Bowen's camper truck violated the Fourth Amendment because the search was not the functional equivalent of a border search and was authorized neither by warrant nor by probable cause.

Judges Merrill, Browning, Duniway, Ely, Hufstedler and Trask concur in this majority opinion (Part I).

FOOTNOTES:

[1]Mr. Justice Stewart's opinion is explicitly identified as "the opinion of the Court." It was approved by a majority of five justices, including Mr. Justice Powell, who stated, " * * * I join the opinion of the Court * * * ." 413 U.S. at 275. Mr. Justice Powell has demonstrated elsewhere that he understands the difference between concurring in an opinion and concurring only in its result. Compare Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 637 (1973) ("I concur in Part II of the Court's opinion * * *. As to Part I * * * I concur only in the result * * * .") with Cleveland Bd. of Educ. v. LaFleur, 42 U.S.L.W. 4186, 4192 (U.S. Jan. 21, 1974) ("I concur in the Court's result, but I am unable to join its opinion.") and Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (concurring only in judgment). The language of Mr. Justice Powell's concurrence in Almeida-Sanchez strongly suggests that his concurrence was not limited to the result. Moreover, his concurring opinion was written primarily to elaborate his views on an issue not presented by the facts of Almeida-Sanchez and not reached by the other justices (but see 413 U.S. at 270 n.3): whether a roving search would be sustainable if it were based on an area search warrant.

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[2]But see Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973), in which the Supreme Court of Pennsylvania held that a routine check of a motor vehicle to determine whether it and its operator were properly licensed violates the Fourth Amendment. See also State v. Cloman, 254 Or. 1, 6 n.2, 456 P.2d 67, 69 n.2 (1969), in which the Supreme

Court of Oregon expressly reserved ruling upon "the right to stop and examine the driver's operating license or the right to stop at a general roadblock." See generally Note, Non-arrest Automobile Stops; Unconstitutional Seizures of the Person. 25 Stan.L.Rev. 865 (1973).

[3]Mr. Justice Powell in his concurrence also noted: "The search here involved * * * was not a border search, nor can it fairly be said to have been a search conducted at the 'functional equivalent' of the border." 413 U.S. at 275-276.

[4]See also United States v. Mejias, 452 F.2d 1190, 1192-1193 (9th Cir. 1971): United States v. Terry, 446 F.2d 579 (9th Cir.), cert. denied, 404 U.S. 946, 92 S.Ct. 301, 30 L.Ed.2d 261 (1971): Castillo-Garcia v. United States, 424 F.2d 482, 484-485 (9th Cir. 1970); Bloomer v. United States, 409 F.2d 869, 870-871 (9th Cir. 1969): Gonzalez-Alonso v. United States, 379 F.2d 347, 349-350 (9th Cir. 1967): Rodriquez-Gonzalez v. United States, 378 F.2d 256, 258 (9th Cir. 1967): Leeks v. United States, 356 F.2d 470, 471 (9th Cir. 1966): King v. United States, 348 F.2d 814, 816 (9th Cir.), cert. denied, 382 U.S. 926, 86 S.Ct. 314, 15 L.Ed. 2d 339 (1965): Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), cert. denied, 366 U.S. 977, 81 S.Ct. 1946, 6 L.Ed2d 1265 (1961), cert. denied, 376 U.S. 946, 84 S.Ct. 803, 11 L.Ed.2d 769 (1964).

[5]See also United States v. Vigil, 448 F.2d 1250 (9th Cir. 1971): United States v. Markham, 440 F.2d 1119, 1121-1123

23 (9th Cir. 1971). See generally Note, From Bags to Body Cavities: The Law of Border Search, 74 Colum. L. Rev. 53 (1974); Note, In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers, 5 N.Y.U.J. Int'l L. & Politics 93 (1972).

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[6]Cf. United States v. King, 485 F.2d 353 (10th Cir. 1973); United States v. Maddox, 485 F.2d 361 (10th Cir. 1973). Both cases held that a warrantless search, without probable cause, of an automobile at the checkpoint in Truth or Consequences, New Mexico, violates the Fourth Amendment unless a search at that checkpoint could be deemed the functional equivalent of a border search. Both cases were remanded to the district court for determination of that issue. However, beyond directing the district court to interpret the phrase as it was used in Almeida-Sanchez, the opinions offer no guidance in defining the functional equivalent of a border search.

[Part I]

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent to Part I of the opinion pertaining to the applicability of Almeida-Sanchez to searches conducted at fixed checkpoints.

With one fell swoop, the majority in Part I news down a law enforcement procedure used for 44 years to curtail the ever-increasing tidal wave of illegal aliens. The use of fixed checkpoints has been neither secret nor clandestine. The procedure has come before our court on numerous occasions[1] with no hint that the practice was constitutionally infirm. For us to reverse ourselves at this late date requires clear and convincing reasons. See Smith v. United States, 273 F.2d 462, 465 (10th Cir. 1959), cert. denied, 363 U.S. 846 (1960). I fail to see them in the majority decision. The only apparent change is the opinion, or better said opinions, in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). A careful analysis, therefore, is required to see if that case dictates our reversal of a long-standing and accepted police practice.

The majority concedes that Almeida-Sanchez is a case involving stops and searches by roving border patrol officers. But by some mystic bridging, it holds that Almeida-Sanchez also requires that we outlaw searches at fixed checkpoints. The Opinion of the Court was delivered by Justice Stewart and concurred in by Justices Douglas, Brennan and Marshall. That opinion becomes the majority only with the added vote of Justice Powell. Justice Powell wrote:

> While I join the opinion of the Court, which sufficiently establishes that none of our Fourth Amendment decisions supports the search conducted

> in this case, I add this concurring opinion to elaborate on my views as to the meaning of the Fourth Amendment in this context."

413 U.S. at 275 (emphasis added). Justice Powell's concurrence, therefore, adds a fifth Justice, and thus a majority, only to that part of the Justice Stewart opinion which invalidates the type of search "conducted in [that] case"--a roving patrol search.[2]

This critical distinction is brought into even closer focus by Justice Powell's demarcation of the four areas where searches typically occur:

> [The search of Almeida-Sanchez' automobile] was not a border search, nor can it fairly be said to have been a search conducted at the "functional equivalent" of the border. Nor does this case involve the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent.

413 U.S. at 275-76 (emphasis added). Thus, one could infer from his statement that searches can constitutionally occur at (1) the border, (2) functional equivalents of the border, (3) permanent checkpoints and (4) temporary checkpoints. He emphasized that the search in question did not occur in any of the four categories. His concurrence, therefore, cannot be said to give any weight to projecting Almeida-Sanchez to cover searches for aliens at fixed checkpoints. He specifically and emphatically limited his concurrence to answering the question of "whether and under what circumstances the Border Patrol may lawfully conduct roving searches of automobiles in areas not far removed from the border for the purpose of apprehending aliens illegally entering or in the country." 413 U.S. at 276.

Our brothers of the Tenth Circuit were faced with a question similar to that presented in this case in United

States v. Bowman, ____ F.2d ____ (10th Cir. Nov. 29, 1973), which involved a stop at a fixed checkpoint located a few miles north of Truth or Consequences, New Mexico. Although they arrived at their conclusion by an alternative route, they discussed the effect of Almeida-Sanchez on the validity of the initial stopping of the defendant's vehicle and held: "We therefore do not read the [Almeida-Sanchez] decision as challenging the right of immigration officials to make routine inquiries as to an individual's nationality."[3] The Tenth Circuit apparently has recognized that Almeida-Sanchez does not resolve the validity of immigration stops and searches at fixed checkpoints.

Ignoring the significance of Justice Powell's limited concurrence, the majority relies basically upon the language quoted by Justice Stewart from Carroll v. United States, 267 U.S. 132 (1925), and contends that that language demonstrates that Almeida-Sanchez also controls the question of searches at fixed checkpoints. However, here the majority falls into the trap of failing to realize that Justice Powell's concurrence does not necessarily make the language in the Justice Stewart opinion a pronouncement by a majority of the Court.

Because of the close fragmented vote and because Justice Stewart's opinion must be limited in application to roving patrols, great insight can be secured from the dissenting opinion of Justice White in which the Chief Justice and Justices Blackmun and Rehnquist concurred. Justice White, after noting that the Court in Carroll v. United States, 267 U.S. at 154, recognized that neither a warrant nor probable cause is required to stop and search at the borders, stated this right was undisputed in Almeida-Sanchez. He also, with

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the concurrence of the three other Justices, concluded: "Neither, apparently, is it disputed that warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border." 413 U.S. at 288. Thus, four Justices have specifically taken a position diametrically opposed to that adopted by the majority in this case. As Justice Powell has limited his opinion to the facts of the roving search, we are left to speculate as to his approach to the fixed checkpoint issue.[4] Suffice it to say that based on the Almeida-Sanchez opinions, four Justices have concluded that searches for aliens at fixed checkpoints are not constitutionally infirm and that there is no majority consensus to the contrary. I, therefore, fail to see how the majority in this case can draw comfort from the Almeida-Sanchez decision.

After concluding that the search of Bowen's vehicle could be justified if it were conducted at a "functional equivalent" of the border, the majority holds that as a matter of fact, this checkpoint is not a functional equivalent. Justice Stewart acknowledges in Almeida-Sanchez that border searches may be conducted at the functional equivalents of the border and gives us two examples. 413 U.S. at 272-73. But the examples give us precious little by way of definition. The majority attempts to expand that definition by referring to border extension cases where the vehicle involved has been under surveillance since it crossed the border, or where it is reasonably certain that persons had just illegally entered, or goods were just illegally smuggled into the United States. These cases are far different from checkpoint cases. They compare like apples and oranges. The only real assistance comes from the two examples in Justice Stewart's opinion. Yet, with this little guidance, the majority makes a factual

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finding that the checkpoint in this case was not a functional equivalent. How is this done? The majority merely states, based on "the record." The record in this case, however, only tells us where the fixed checkpoint is, how far it is from the border, that several highways intersect Highway 86 before the checkpoint, that there are several cities along the Highway before the checkpoint, that Bowen was stopped to see if any aliens were aboard his vehicle and that during the stop, contraband was discovered. There is no evidence as to the amount of traffic that comes through the checkpoint from the border area, the number of illegal aliens arrested at the checkpoint, or other information that would seem to bear on this question. The imprudence of deciding this issue on an incomplete record looms ever larger in view of the fact that a district court, after taking extensive testimony, concluded that the Route 86 checkpoint was a functional equivalent of the border. United States v. Baca, _____ F.Supp. _____ (S.D. Cal. Jan. 3, 1974). We would be far better advised to test the majority's theories on a factual record such as that developed in Baca rather than to make factual assumptions which may or may not be correct.[5]

This leads to the real question: What test does the majority apply to determine whether a fixed checkpoint meets the strictures of the Fourth Amendment?

It says that the government cannot justify searches made at fixed checkpoints without a warrant or probable cause on the basis of 8 U.S.C. § 1357(a)(3) and 8 C.F.R. § 287.1(a)(2) because the statute and regulation were vitiated in Almeida-Sanchez. But, once again, the majority fails to realize that the Justice Powell concurrence limits the Opinion of the Court so that it cannot be construed to apply to fixed checkpoints. But even if one ignores the significance of Justice Powell's

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concurrence, Justice Stewart did not state that 8 U.S.C. § 1357(a) and the regulations issued pursuant to it were unconstitutional on their face, but merely that the statute could not vindicate a search that is otherwise in violation of the Fourth Amendment. Consequently, when the majority invalidates searches at fixed checkpoints simply because they too are conducted pursuant to 8 U.S.C. § 1357(a) without independent consideration of whether such searches are reasonable under the Fourth Amendment, they bridge a gap with oversight rather than sound legal reasoning.

After finding as a fact that the checkpoint on Highway 86 was not a functional equivalent (in spite of there being no record upon which such a conclusion could be based) and after holding that the statutory power has been dissolved by Almeida-Sanchez (when there was no majority of the Supreme Court so holding), the majority concludes that the Fourth Amendment was violated because (1) "the search was not the functional equivalent of a border search" and (2) it "was authorized neither by warrant nor by probable cause."[6] The majority's test is incomplete. Four Supreme Court Justices have concluded that warrantless searches for aliens without probable cause may be made at fixed checkpoints. Their test was one of balancing the appropriate interests to determine whether the search was reasonable. Such an approach does not preclude Fourth Amendment analysis, but applies it without requiring that the search satisfy artificial criteria. It focuses upon the balancing protections afforded by the Fourth Amendment, as reiterated by Justice White, dissenting in Almeida-Sanchez: "The Amendment's overriding prohibition is ... against 'unreasonable' searches and seizures ...." 413 U.S. at 287-88. See Cady v. Dombrowski, 413 U.S. 433, 439

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(1973). Whether or not a search is reasonable "depends upon the facts and circumstances of each case and ... searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the results might be the opposite in a search of a home, store, or other fixed piece of property." Cady v. Dombrowski, 413 U.S. at 440, quoting Cooper v. California, 386 U.S. 58, 59 (1967).

In addition, we should not overlook the fact that the law enforcement personnel were operating pursuant to a statute. In such a case, there is even more reason to apply the broad test of reasonableness. See United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

Certain types of searches have been constitutionally approved as reasonable although they have been made without probable cause or a warrant. A careful analysis of areas where such searches have been upheld as reasonable within the meaning of the Fourth Amendment demonstrates persuasive reasons for the same approach in testing the constitutionality of stops and searches at fixed checkpoints. For example, in Terry v. Ohio, 392 U.S. 1 (1968), the Court concluded that such a search was reasonable after applying a test that balanced the interests of the individual in being free from invasions to his personal privacy against the interests of society in assuring the safety of its law enforcement officers. Under the circumstances of Terry, a pat-down without a warrant or "probable cause" was not considered unreasonable. Similarly in Camara v. Municipal Court, 387 U.S. 523 (1967), the Court upheld a non-objected-to[7] search of all structures in a certain area to enforce a building code in spite of the nonexistence of probable cause or a warrant. Once again, the

balancing test of reasonableness was applied to measure "the need to search against the invasion which the search entails." Id. at 537.

Stops and searches similar to the one objected to by Bowen occur not infrequently and, in many instances, are necessary facets of our way of life. The complexity of our society requires such limited intrusions in order to protect the rights of the majority.[8] In these specific areas, as long as the stops and searches are limited in their scope to a proper objective and are not unreasonable, they satisfy the Fourth Amendment.

For example, all interstate motor carriers may be stopped for safety or other regulatory inspections. 49 U.S.C. § 304 and 49 C.F.R. § 396.5. Certainly, if contraband is discovered during such a search it could be used as evidence of the commission of a crime. Motor carriers are also stopped and weighed, which can be considered a limited search, as they enter a state. Such stops and searches have been upheld as legal. Commonwealth v. Abell, 275 Ky. 802, 122 S.W.2d 757 (Ky.App. 1938). Similarly, probable cause is not necessary to stop a vehicle to check for a valid driver's license and contraband found incident to such a stop is not the subject of an illegal search.[9] United States v. Croft, 429 F.2d 884 (10th Cir. 1970); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965). Another example is the routine searches of baggage and other personal effects of persons entering the mainland from Hawaii for infectious plants which has also been upheld as reasonable within the Fourth Amendment. United States v. Schafer, 461 F.2d 856 (9th Cir. 1972).

Perhaps the most obvious example is the limited search that all passengers on airline flights are subjected to

before they are even allowed in the boarding areas. At least at one time, if the would-be passenger met additional criteria (supposedly objective but which were secretly held by officers and airline employees), he could be subjected to an even more detailed search. We have repeatedly held that evidence of a crime found in the course of such a search may not be suppressed on the theory that the search violates the Fourth Amendment. E.g., United States v. Doran, 482 F.2d 929 (1973); United States v. Davis, 482 F.2d 893 (1973). When the interest of the public in being protected against the dangers of a highjacking were weighed against the intrusion, we concluded that such searches were reasonable.[10] As we stated in United States v. Davis, 482 F.2d at 910:

> To pass constitutional muster, an administrative search must meet the Fourth Amendment's standard of reasonableness. "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, supra, 387 U.S. at 536-537, 87 S.Ct. at 1735.

I would not restrict the constitutional test in this fact situation as does the majority but would determine whether the search at this fixed checkpoint was unreasonable under the Fourth Amendment. The majority holds that:

> The opinion in Almeida-Sanchez, delivered by Mr. Justice Stewart, leaves little doubt that traditional Fourth Amendment standards apply to fixed-checkpoint searches as well as to roving-patrol searches. (Foonote omitted.)

But there is a majority holding only on the issue of roving patrols. There is a vast difference between a red-light, midnight stop on a lonely road and approaching a well-lighted, fixed checkpoint with warning signs and uniformed men plainly visible.[11] The majority's assumption that five of the

Justices have or would apply the same standard in both is one I cannot accept.

Under the correct test, whether the search at this fixed checkpoint was unreasonable should be determined in the first instance by the trial court after hearing all of the evidence. Such a determination is primarily factual. In applying this test the trial court would balance the rights of the individual vehicle driver against the interests of all the people of the country in stemming an avalanche of persons illegally crossing our borders.[12] Both Justices Powell[13] and White[14] refer to the Herculean challenges faced by those directed to prevent illegal entries. Before we direct the Dutch boy to remove his finger from the dike, we owe it to the American people at least to balance their interests against the interests of the individual in being free from this limited intrusion.

While no one can give an accurate count, it has been estimated that there are approximately 800,000 to over 1 million illegal aliens in our country; approximately 85% of these are citizens of Mexico. United States v. Baca, _____ F.Supp. at _____. The major problem is the abortive attempt to guard 2,000 miles of border with Mexico from the Gulf of Mexico to the Pacific coast.

In addition to aliens entering illegally, 91 million aliens entered the United States legally during the fiscal year 1972, with over 39 million of these entering directly into Southern California. Id. at _____. A large percentage of these visitors enter with temporary border passes, restricting them to a seventy-two hour stay and to travel within twenty-five miles from the border. Id. at _____; see 8 C.F.R. § 212.6. To enforce these restrictions, some type of

investigation away from the border is required. The majority suggests that this flow of illegal aliens can be sufficiently regulated by alternative methods. But I suggest that we do not have sufficient information in this record to make that determination. Indications are that anything short of an Iron Curtain type border patrol would be ineffective in curtailing the number of illegal entries. United States v. Baca, _____ F.Supp. at _____. Further, even stopping the illegal flow across the border would not halt those legally entering but illegally travelling more than twenty-five miles from the border. Therefore, while I agree with the majority that alternative methods of enforcement of the law should be included in the balancing approach, one district court found:

> The evidence presented before this court clearly established that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol, in the absence of the checkpoints, for even a geometric increase in its personnel or line watch would not leave any control over those admitted as temporary visitors from Mexico.

Id. at _____. Certainly from the record before us, we cannot make a contrary conclusion.

If we are to test the search in this case as to whether it is unreasonable under the Fourth Amendment, it would be necessary to remand the matter for a factual determination. The findings already made by one district court pertaining to the checkpoint where Bowen was stopped indicate that such would not be a fruitless exercise.[15] With an adequate factual record, we could proceed with the delicate constitutional balancing necessary to determine whether the stop and search were unreasonable. XXXX

5. The Tenth Circuit, erroneously, I think, has also applied a limited Fourth Amendment test to a fixed checkpoint but did remand for a factual determination on the question of whether the checkpoint was a functional equivalent. United States v. King, 485 F.2d 353 (10th Cir. 1973); United States v. Maddox, 485 F.2d 361 (10th Cir. 1973).

6. The majority would apparently require that an officer have probable cause to believe that a crime has been committed before a warrantless search would be allowed. Such a belief would allow him to make an arrest and conduct a search incident to that arrest. This ruling would, in effect, mean that no vehicle could be searched at fixed checkpoints for illegal aliens unless the officer first had probable cause to arrest the driver of the car or had obtained a search warrant. Since a search warrant, in the traditional sense, could not be obtained prior to the time when the vehicle reached the checkpoint, and since requiring the driver to wait for the officer to obtain a warrant would be an arrest, the checkpoints would

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be limited in their deterrent effect on illegal aliens. It is not clear whether the majority opinion would allow immigration officials to stop vehicles as they come through the checkpoints to ask the citizenship of the occupants. If so, the checkpoints could still have some deterrent effect.

7. Camara is partially distinguishable due to the non-objected-to search but a similarity exists in that adequate warnings are given as one approaches a fixed checkpoint and a driver can stop (and may in some instances be able to turn around) rather than proceed if he objects to the fixed checkpoint stop. See United States v. Baca, _____ F.Supp. at _____.

8. In balancing the interests of the majority against the interests of the individual, it is necessary that before we uphold a warrantless search we give major consideration to whether requiring a warrant would frustrate the governmental purpose behind the search. Camara v. Municipal Court, 387 U.S. 523, 529 (1967). Since requiring a search warrant, in the traditional sense, would in effect preclude the search of all automobiles at the checkpoints, this requirement has been satisfied in this case. However, some type of area search warrant, as suggested by Justice Powell, may be possible in the checkpoint situation. See note 3, supra. That alternative is not before us now.

9. The majority notes the cases upholding stops for inspection of drivers' licenses and vehicle registration, but distinguishes them from stops at fixed checkpoints on the basis that if such stops were not allowed the driver's license and vehicle statutes would be rendered unenforceable, whereas the majority is "not persuaded" that the immigration laws would similarly be rendered unenforceable by this decision. The record in this case is not complete enough to allow us to

determine what effect our decision will have on the enforcement of the immigration laws, but indications are that the adverse effects will be substantial. See United States v. Baca, _____ F.Supp. at _____.

10. In United States v. Davis, 482 F.2d 893 (9th Cir. 1973), we ~~xxxx~~ set forth the criteria necessary for such a search to be reasonable. We stated that (1) the search must be "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of a crime ...." 482 F.2d at 908. (2) The essential purpose of the search must be not to detect contraband or apprehend criminals, but "to deter persons carrying [weapons or explosives] from seeking to board at all." 482 F.2d at 908. (3) The scope of the search must be limited to meet reasonably the need. And (4) the person must have the choice of electing to submit to the search or to not board the flight. 482 F.2d at 913.

The search in this case satisfies these criteria. (1) Bowen was stopped as part of a routine check for illegal aliens proceeding to the interior of this country. Either all vehicles passing through the checkpoint were stopped or a limited number were stopped based upon objective criteria that would give the officer reasons to suspect that illegal aliens may be within the vehicle. United States v. Baca, _____ F.Supp. at _____. (2) The primary purpose of the stop and the search was not to detect contraband or criminals, but rather to deter illegal aliens from attempting to flee to interior cities with large populations. Id. at _____. The stop and the search were conducted pursuant to a statute designed to regulate immigration rather than general law

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enforcement. (3) The scope of the search was limited to areas where a person may hide. Other areas were not searched until the officer had probable cause to believe a crime had been committed. And (4) the checkpoint was permanent, well-lighted and clearly identified. All persons proceeding through the checkpoint had reason to know that they would be questioned as to their citizenship and subjected to a limited search for illegal aliens. They had the alternative to stop or, in this case, to turn around.

11. United States v. Baca, _____ F.Supp. at _____.

12. Many of the factors enumerated by Justice Powell as a prerequisite for an area search warrant might also be considered in determining whether there was an unreasonable interference with the individual's rights:

> [T]hey include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use; and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

413 U.S. at 283-84 (footnote omitted).

13. The Government has made a convincing showing that large numbers of aliens cross our borders illegally at places other than established crossing points, that they are often assisted by smugglers, that even those who cross on foot are met and transported to their destinations by automobiles .... It would, of course, be wholly impracticable to maintain a constant patrol along thousands miles of border. Moreover, because many of these aliens cross the border on foot, or at places other than established checkpoints, it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country. Thus the magnitude of the problem is clear.

413 U.S. at 265-66.

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14. The external boundaries of the United States are extensive. The Canadian border is almost 4,000 miles in length; the Mexican, almost 2,000. Surveillance is maintained over the established channels and routes of communication. But not only is inspection at regular points of entry not infallible, but it is also physically impossible to maintain continuous patrol over vast stretches of our borders. The fact is that illegal crossings at other than the legal ports of entry are numerous and recurring.

413 U.S. at 293 (emphasis added).

15. In United States v. Baca, _____ F.Supp. at _____, the trial judge made the following findings of fact:

The Border Patrol has established a checkpoint on Route 86 west of the Salton Sea National Wildlife Refuge just north of the intersection of State Route 78. This location is approximately 36 air miles and 49 road miles from the Mexican border. The checkpoint is bordered on the east by farm land extending for about three miles to the Salton Sea. To the west and south of this checkpoint lies desert.

At this location the Border Patrol has a building and traffic check signs together with blinker lights. A power source is located at the facility. The signs are of the usual type and the floodlights at night cause the area to be very well lit. As can be seen from photographs introduced by the government, the area is desolate country with virtually no inhabitants between the checkpoint and the border.

The Border Patrol attempts to keep this checkpoint operating on a 24-hour basis and in fiscal 1973 they operated around 6,000 hours which is approximately 65 to 70 percent of the time.

At this checkpoint the checking operations are of the usual type with about 75 percent of the vehicles traveling through it being stopped for inquiry with around 10 percent to 15 percent of all vehicles being detained for further inspection. It is estimated that over half of the vehicles at this checkpoint have come directly from Mexicali or have occupants who walked across the border at Calexico.

During the first ten months of calendar year 1973 approximately 690 deportable aliens were apprehended at this checkpoint according to the detailed traffic logs maintained by the Border Patrol.

This checkpoint is located on a point with one of the lowest volumes of traffic along Route 86 north of the population centers of Calexico, Brawley and El Centro.

From these facts, the district court concluded in part:

The checkpoint on Route 86 is situated at a point with one of the lowest volumes of traffic on that highway, thus tending to cause little intrusion and inconvenience to travelers, as well as scarcely impeding the goal of safe driving. This checkpoint is not easy to intentionally circumvent without being steered into another checkpoint on another highway, in that it is bordered by the Salton Sea on one side and desert on the other. It lies just 36 air miles from the Mexican border and it has been estimated that over half of the vehicles reaching this checkpoint have come directly from Mexicali, B.C., Mexico.

XXXX

PART II

WALLACE, Circuit Judge:

The first step in deciding whether a case is to have retroactive effect is to apply a threshold test to determine whether the decision establishes a new rule. If it does, we proceed to test whether the new rule is retroactive. If it does not, no such testing is necessary as, by definition, without a new rule, there is no change in the law and the question of retroactivity is immaterial. For purposes of this case, we hold that to constitute a new rule, the decision must either (1) overrule clear past precedent or (2) disrupt a practice long accepted and widely relied upon.[1]

Under the first alternative of the test, a decision constitutes a new constitutional rule if it overrules clear past precedent. The test does not require, however, that the Supreme Court reverse itself in order for there to be an overruling of clear past precedent. Such a requirement would not only be illogical but would also be violative of the reason for the rule. Only a small number of the appealed federal cases are ever reviewed by the Supreme Court. As a matter of necessity, the Court must leave the day-to-day application of the law to the lower courts. Therefore, law

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enforcement procedures must be based to a great extent upon circuit court decisions. Because of this necessity, a law enforcement practice may develop and be sanctioned by court approval for many years before it is reviewed by the Supreme Court. Where such a rule is ultimately reversed by the Court, the pronouncement is "new" simply by virtue of the fact that the people who apply the law on a day-to-day basis have not previously understood the new statement to be the proper rule. Justice Blackmun recognized this principle, noting specifically that the new pronouncement need not overrule a prior Supreme Court case, when he wrote in Gosa v. Mayden, 413 U.S. 665, 673 (1973):

> Although the Court in O'Callahan did not expressly overrule any prior decision, it did announce a new constitutional principle, and it effected a decisional change in attitude that had prevailed for many decades.

Prior to Almeida-Sanchez, there was no indication from any of the courts of appeals that searches at fixed checkpoints were unconstitutional. Rather, the indication was that such searches were constitutional, for 35 of 36 judges who had considered the question in the three circuits involved in enforcing the immigration laws along our Mexican border had upheld immigration stops and searches. Almeida-Sanchez v. United States, 413 U.S. at 298-99 n.10 (White, J. dissenting).

In addition to the numerous court pronouncements, the statute pursuant to which the Border Patrol acted also constitutes clear past precedent. Since 1952, searches for aliens within a reasonable distance from the border have been authorized by Congress. 8 U.S.C. § 1357(a)(3). Obviously, such a statute establishes a legal rule until repealed or declared unconstitutional. Although the Supreme Court did

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hold that, under the facts of Almeida-Sanchez, that statute cannot make a search conducted by a roving patrol reasonable within the Fourth Amendment, it was the prior law just as much as Wolf v. Colorado, 338 U.S. 25 (1949), was the prior law until Mapp v. Ohio, 367 U.S. 643 (1961). The prior law, be it statutory or case law, guides law enforcement personnel and courts until abrogated. Here, the prior law was, in part, statutory and remained unassailed by the Supreme Court or circuit courts for twenty years. It was then limited by Almeida-Sanchez. Although it is true that statutes have to be measured by the Constitution, a legally enacted statute becomes the law until it is vitiated by a court decision. Where the constitutionality of the statute has been repeatedly upheld by the lower courts, it becomes a clear precedent for law enforcement action. Prior statutory law should be treated no differently from prior case law. Thus, Almeida-Sanchez, as applied to searches at fixed checkpoints, overrules clear past precedent, both statutory and case law.

Under the second alternative of the threshold test, a decision constitutes a new constitutional rule if it disrupts a practice long accepted and widely relied upon. Here too, Almeida-Sanchez measures up as a new pronouncement. For over a decade we have consistently and repeatedly upheld convictions based upon evidence seized during searches made at fixed checkpoints; in none of these cases has the constitutionality of such searches been questioned.[2] A law enforcement practice authorized by our court for such an extensive period easily satisfies the second alternative of the test. Under either alternative, Almeida-Sanchez is a new pronouncement.

We, therefore, must determine whether this new rule should be applied retroactively to fixed checkpoints. As the

Constitution does not mandate retroactive application, Linkletter v. Walker, 381 U.S. 618, 629 (1965), we must use judicially conceived guidelines to resolve the issue. The tripartite test developed by the Supreme Court in numerous decisions over the last decade was enunciated in Stovall v. Denno, 388 U.S. 293 (1967), and recently reiterated in Michigan v. Payne, 412 U.S. 47, 51 (1973). The Stovall test requires that, before we apply new constitutional protections retroactively, we consider the following three criteria:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. Denno, 388 U.S. at 297.

Criterion (a) of the Stovall test, the purpose to be served by the new standard, generally dictates that the new pronouncement be applied retroactively only when the pronouncement affects the "fairness of the trial--the very integrity of the fact-finding process." Linkletter v. Walker, 381 U.S. at 639. Since the legality of the search in no way affects the court's ability to determine whether or not the defendant is actually guilty of committing the crime, a pronouncement requiring the suppression of such evidence serves only as a procedural device to deter future improper police conduct. See United States v. Calandra, _____ U.S. _____ (Jan. 8, 1974). Such pronouncements generally should not be applied retroactively. As we held in Williams v. United States, 418 F.2d 159, 162 (9th Cir. 1969), aff'd, 401 U.S. 646 (1971):

> The Court in Desist [394 U.S. 244 (1969)] said the foremost of the three criteria was the first. If the purpose is to deter misconduct of police officers in conducting

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> a search, the new exclusionary rule will not be given retrospective effect because that purpose is not advanced by penalizing conduct that has already occurred. The exclusionary rule in such cases, the Court observed, was a procedural device to curb illegal police action and not a rule affecting the integrity of the process for finding the innocence or guilt of an accused.

Criterion (b) of the Stovall test, the reliance of law enforcement officers on the old standards, is similar to the second alternative of our threshold test. A careful analysis demonstrates that law enforcement personnel justifiedly relied on the prior rule. Since Almeida-Sanchez did not determine the constitutionality of searches at a fixed checkpoint, let alone establish a new rule as to such searches applying Almeida-Sanchez to fixed checkpoints would overturn our own Ninth Circuit precedents which stretch back over a decade.

In Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963), we were specifically faced with the issue of the constitutionality of the statute and regulations authorizing stops and limited searches at a fixed checkpoint. Appellant Fernandez expressly specified as error:

> 1. Regulations sanctioning check points 70 miles within the United States are unconstitutional and illegal per se, and are unconstitutional and illegal as applied in this case.
>
> 2. The stopping of cars 70 miles within the confines of the United States constitutes unconstitutional and illegal search and is unlawful without probable cause.
>
> 3. Evidence discovered during a search following such illegal stopping of a car is "fruit of a poisoned tree", and must be suppressed.

321 F.2d at 285. We found that the statute and regulations, pursuant to which the checkpoints were operated, were "clearly constitutional." After reviewing extensive findings of fact

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by the district court concerning the necessity of such checkpoints, we concluded that the statute and regulations as applied were "neither arbitrary nor capricious." We further held that after the officers had legally stopped the car, their detection of the odor of marijuana constituted probable cause sufficient to justify a search of the car. We have repeatedly reaffirmed Fernandez, not only upholding the validity of the initial stopping of the car, but also upholding reasonable searches for aliens made without probable cause. In Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970), after reviewing Fernandez and a number of our other earlier cases, we concluded:

> What all of these cases make clear is that probable cause is not required for an immigration search within approved limits but is generally required to sustain the legality of a search for contraband in a person's automobile conducted away from the international borders.

429 F.2d at 1013 (footnote omitted). Given the number and the explicitness of our prior pronouncements,[3] it would be hard to find a clearer case justifying reliance on an old standard. Immigration stops and searches at fixed checkpoints a practice that has extended over a 44 year period, has enjoyed ten years of continued and uninterrupted judicial approval. If the border patrol agents cannot rely upon a statute supported by clear regulations which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval, it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified. See Adams v. Illinois, 405 U.S. 278, 283-84 (1972 Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

What was said in Stovall v. Denno, 388 U.S. 293, 299-300 (1967), is equally applicable here:

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> Today's rulings were not foreshadowed in our cases; no court announced such a requirement .... Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontation in the absence of counsel.

Criterion (c) of the Stovall test requires that we consider the effect the retroactive application of the new pronouncement would have on the administration of justice. The record before us is inadequate to indicate what the effect would be in requiring probable cause or a warrant for all prior stops and searches made at fixed checkpoints. For example, it is impossible to tell how many illegal aliens, as well as alien smugglers and other criminals, were captured red-handed at fixed checkpoints since their inception in 1929. Nonetheless, we are aware that in fiscal year 1973 alone, there were approximately 55,300 deportable aliens apprehended at traffic checkpoints. United States v. Baca, _____ F.Supp. _____, _____ (S.D. Cal. Jan. 3, 1974). There can be no doubt that a rule requiring the suppression of all evidence obtained by searches made at fixed checkpoints without a warrant or probable cause, applied retroactively, would create immense problems hindering the administration of justice. It is not inconceivable that thousands of convicted criminals might have to be retried or set free.

Nor do we believe, as has been contended, that Robinson v. Neil, 409 U.S. 505 (1973), should lead us to a different conclusion. There, retroactivity was applied to a non-fact-finding aspect (double jeopardy). But the Court clearly noted that it was creating an exception to the Linkletter-Stovall approach similar to that which made the death penalty cases retroactive. The Court explained that prospective application has generally been applied under

Linkletter when the rule was directed "to collateral purposes such as the deterrence of unlawful police conduct ...." Id. at 509. They then specifically distinguished rules with collateral purposes from the double jeopardy situation where a defendant could possibly be punished twice for the same crime. The obvious import of Robinson in reference to the case before us is that where the purpose of the rule is the deterrence of unlawful police conduct, the rule will be prospective only.

The only remaining question is the date upon which Almeida-Sanchez would become applicable to searches at fixed checkpoints. Some would argue that there should be at least a limited retroactivity, requiring us to apply the new rule to those cases involving searches at fixed checkpoints that are now on direct appeal. These are the so-called "pipeline" cases. We reject this approach and hold that Almeida-Sanchez applies only to searches at fixed checkpoints after June 21, 1973, the date of the Almeida-Sanchez decision. The Supreme Court's recent decisions indicate that the pipeline theory does not enjoy majority approval. See Stovall v. Denno, 388 U.S. 293 (1967). The Court had precisely that issue before it in Williams v. United States, 401 U.S. 646 (1971), and a majority declined to apply the new rule either to the cases in the pipeline (on direct appeal) or to the cases that were before the Court on collateral attack. Only Justices Brennan and Marshall supported the pipeline theory.

In Michigan v. Payne, 412 U.S. 47 (1973), the Court again adopted limited prospectivity, i.e., only the challenging appellant would benefit from the new rule.[4] In Payne, the Court held that the prospective limitations established in North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969),

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would not be applicable to resentencing proceedings that occurred prior to the date of the Pearce decision, even though Payne's appeal was in the pipeline when Pearce was decided. Justice Marshall, dissenting, concluded that "considerations of fairness rooted in the Constitution [require] that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule." 412 U.S. at 60. None of the other Justices joined in this part of his dissent and Justice Marshall himself admitted that, other than exceptions not applicable in this case, all "constitutional rules of criminal procedure have been given prospective effect only." 412 U.S. at 62 (footnote omitted). He noted that limited retroactivity, as applied in Linkletter [381 U.S. at 622], was an "anomaly."[5] It would be unwise for us to adopt the pipeline theory when the Court has declined to apply it.

Limited prospectivity is not a new idea in the line of cases dealing with the retroactivity of new rules of criminal procedure. In Johnson v. New Jersey, 384 U.S. 719 (1966), decided only one year after Linkletter, the Court held that Escobedo and Miranda would apply only to cases in which the trial began after the dates of the decisions. One could argue that Johnson does not really deal with the pipeline theory because the case was before the Court on collateral attack. But such an argument would ignore the fact that the Court expressly announced that:

> [W]e do not find any persuasive reason to extend Escobedo and Miranda to cases tried before those decisions were announced, even though the cases may still be on direct appeal.

384 U.S. at 733. Limited prospectivity, as the Court discussed it in Johnson, is particularly suited for application in this case. A majority of our court has agreed that

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Almeida-Sanchez as applied to fixed checkpoints enunciates a new rule of criminal procedure. The sole purpose for the new rule is to deter future police misconduct. United States v. Calandra, _____ U.S. _____ (Jan. 8, 1974). Given this conclusion, the new rule can reasonably be applied only to convictions based upon searches conducted after the date of the Almeida-Sanchez decision. Freeing Bowen from his conviction will not deter future police misconduct.

If the new constitutional rule is designed to correct a defect that involves the court's ability to determine whether a defendant is guilty or not, it obviously has to be fully retroactive. But here, the new rule has no such effect. Bowen, like Almeida-Sanchez, is a convicted felon--caught red-handed. The question is not whether they violated the law, but rather whether they should be freed because the police detected their violations through unconstitutional procedures. We are applying the Almeida-Sanchez rule to searches conducted at fixed checkpoints only to deter these unconstitutional procedures in the future. Our reason for applying the rule demonstrates that it should be applied prospectively only. Almeida-Sanchez receives the benefit of the new rule because of the Court's apparent belief that to do otherwise would put the Court in the position of providing advisory opinions.[6] That policy is not enhanced or furthered by applying the rule to other cases on appeal. There is no compelling reason which requires that we overturn many convictions merely because the Supreme Court mandates that one must be overturned.

We conclude that any application of Almeida-Sanchez to fixed checkpoints would be a new rule and under the Stovall test, it would have to be applied prospectively to searches

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subsequent to June 21, 1973. Therefore, Almeida-Sanchez can be of no assistance to Bowen.

AFFIRMED.

Judges Chambers, Koelsch, Wright, Trask, Choy and Sneed concur in this majority opinion (Part II).

FOOTNOTES

1. This threshold test comes from a footnote in Justice Stewart's dissent in Milton v. Wainwright, 407 U.S. 371, 381-82 n.2. (1972). Whether this abridged test should be applied in all cases is unclear.

Justice Stewart enunciated a similar test a year earlier in Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971), as follows:

> [T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed .... (Citations omitted.)

The fact that Chevron Oil was a civil rather than a criminal case should not make any difference. Linkletter v. Walker, 381 U.S. at 627. It is not clear, however, whether the Court will require that one of the Justice Stewart threshold tests always be satisfied before it will apply the Stovall test. For example, in Robinson v. Neil, 409 U.S. 505 (1973), the Court declined to apply Linkletter (the Stovall test) to determine whether Waller v. Florida, 397 U.S. 387 (1970), should be applied retroactively because the issue in question was directed to the fundamental fairness of double jeopardy rather than directed "to collateral purposes such as the deterrence of unlawful police conduct ...." 409 U.S. at 509. Although one could argue that Waller was a "new" constitutional pronouncement, the Court did not discuss this consideration in deciding not to apply the Stovall test.

In Michigan v. Payne, 412 U.S. 47 (1973), the Court was faced with the question of whether North Carolina v. Pearce, 395 U.S. 711 (1969), should be retroactive and applied the Stovall test to only part of the Pearce rule. The Court stated, without applying the Stovall test, that no new constitutional rule was established by requiring that resentencing not be retaliatory and, thus, that rule would be available

equally to all defendants regardless of the date of their sentencing. However, the Court applied the Stovall test to the "prophylactic" limitations established in Pearce requiring the judge to give reasons, concluding that they should be applied only prospectively. One could infer from Payne that the Stovall test should be applied only to "new" rules, but Robinson indicates that other factors may also be relevant.

Perhaps the clearest example indicating that the Court may apply a threshold test is Justice Blackmun's opinion in Gosa v. Mayden, 413 U.S. 665 (1973), in which the Court declined to apply the rule announced in O'Callahan v. Parker, 395 U.S. 258 (1969), retroactively. Before applying the Stovall test, Justice Blackmun found it necessary to determine whether Gosa was an appropriate case to even consider the question of retroactivity. Although noting that the O'Callahan case was a "clear break with the past," the primary consideration influencing Justice Blackmun to apply the Stovall test was the fact that the convictions under the prior rule were not "so unfair as to be void ab initio." 413 U.S. at 675. Rather, O'Callahan created a prophylactic rule designed to enhance "a newly recognized constitutional principle." 413 U.S. at 675. Even though he noted that the rule was new, Justice Blackmun, like the Court in Robinson, appeared to be more concerned with whether the rule affected the integrity of the judicial process than with whether or not it was new.

From these cases, it appears that the Court has not yet formulated a single threshold test to be applied in all cases.

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2. United States v. Barron, 472 F.2d 1215 (9th Cir.), cert. denied, _____ U.S. _____ (1973); United States v. Campos, 471 F.2d 296 (9th Cir. 1972); United States v. Aranda, 457 F.2d 761 (9th Cir. 1972); Mienke v. United States, 452 F.2d 1076 (9th Cir. 1971); Duprez v. United States, 435 F.2d 1276 (9th Cir. 1970); Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); United States v. Avey, 428 F.2d 1159 (9th Cir.), cert. denied, 400 U.S. 903 (1970); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970); Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967); Renteria-Medina, 346 F.2d 853 (9th Cir. 1965); Fernandez v. United States, 321 F.2d 9th Cir.
283 (1963); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961); Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960).

3. See cases cited in note 2, supra.

4. Apparently, the Court has adopted a position of limited prospectivity, rather than pure prospectivity, on the rationale that in order for the Court's pronouncement to avoid being classified as dictum, it must be applied to the parties before the Court. See Stovall v. Denno, 388 U.S. 293, 301 (1967). There has been some criticism of this rationale, [see, e.g., 1B J. Moore, Federal Practice ¶ 0.402 [3.--2-3] (1965)] and the Court has not hesitated to apply a pronouncement with full prospectivity when such a result was appropriate. E.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964); James v. United States, 366 U.S. 213 (1961). See Johnson v. New Jersey, 384 U.S. 719, 733 (1966). The primary

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reason for the Court's adoption of limited prospectivity in cases involving new rules of criminal procedure may be that if the new rule is not applied to the defendant before the Court, defense counsel may lack incentive to proceed with an appeal in cases where they believe there may be an unconstitutional practice. See Stovall v. Denno, 388 U.S. at 301; Note, Retroactivity Of Criminal Procedure Decisions, 55 Iowa L. Rev. 1309, 1317 (1970).

5. Justice Marshall stated:

> Linkletter v. Walker, 381 U.S. 618 (1965), giving a limited retroactive effect to Mapp v. Ohio, 367 U.S. 643 (1961), is an anomaly at odds with the Court's subsequent treatment of problems of retroactivity and can be explained only by the Court's unfamiliarity with those problems when the case was decided. See also Johnson v. New Jersey, 384 U.S. 719 (1966).

412 U.S. at 62 n.5.

6. See note 4, supra.

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[Part II]

GOODWIN, Circuit Judge, concurring and dissenting:

Believing that the legal history of roving patrols is fundamentally different from the legal history of fixed-checkpoint searches, I concur in that part of Judge Wallace's opinion in Part II which limits the holding of Part I to searches conducted after June 23, 1973. While a roving-patrol search, supported by neither warrant nor probable cause, was not upheld by this circuit until 1970 (United States v. Miranda, 426 F.2d 283 (9th Cir. 1970)), a mere two years before certiorari was granted in Almeida-Sanchez (406 U.S. 944 (1972)), fixed-checkpoint searches enjoyed judicial approval at least since 1963 (Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963)) and apparent statutory authorization since 1946 (Act of Aug. 7, 1946, ch. 768, 60 Stat. 865). Our rejection of fixed-checkpoint searches therefore "marks a sharp break in the web of the law," Milton v. Wainwright, 407 U.S. 371, 381-82 n.2 (1971) (dissenting opinion of Stewart, J.), sufficient to deny retroactive application.

My concurrence is qualified, however, by the belief that Bowen himself should be entitled to the fruits of his appeal. He fully preserved his objections to the search of his camper-truck by the border patrol. He took his case all the way to the Supreme Court, which reversed his conviction and remanded the case for reconsideration in light of Almeida-Sanchez. Now, we tell Bowen that he was right, that searches at fixed checkpoints, supported by neither a warrant nor probable cause, are unconstitutional. Yet, we also tell him that because of a judicially created rule of nonretroactivity, he cannot take advantage of a ruling

which he has fought for two years to obtain. However, regardless of the nonretroactivity of our newly announced rule on fixed checkpoints, as the moving party in the case in which this new rule has been announced, Bowen is fully entitled to its protection. To prevent having our determination in Part I stand as mere dictum, as well as to comply with the "case or controversy" requirement of Article III of the Constitution, we must allow Bowen to benefit from our constitutional determination. See Stovall v. Denno, 388 U.S. 293, 301 (1967). See also Desist v. United States, 394 U.S. 244, 254-55 n.24 (1969).

Judges Merrill, Browning and Duniway concur in this concurring and dissenting opinion.

HUFSTEDLER, Circuit Judge, with whom Judge Ely concurs, concurring in part I and dissenting from part II, of the opinion of the Court:

I cannot concur in the opinions confining the Almeida-Sanchez rule to searches occurring after June 21, 1973, with or without an exception for Bowen himself, when the locale of the search was a fixed checkpoint that was not the functional equivalent of an international border.

My brothers and I agree that no retroactivity issue arises unless Almeida-Sanchez stated a new rule marking "a sharp break in the web of the law."[1/] We are also in agreement that Almeida-Sanchez announced no new Supreme Court rule and that it signaled no break at all in the constitutional principles stated by the Court.[2/] Injection of the retroactivity issue in the opinions of my brothers Wallace and Goodwin rests on two assumptions: (1) Congress, the Ninth Circuit, and the Immigration and Naturalization Service, prior to Almeida-Sanchez, had long agreed that automobile searches conducted by personnel of the Service at fixed checkpoints that were not functional equivalents of international boundaries should be treated as if they were such "border searches," thus eliminating the Fourth Amendment's requirements of a warrant and probable cause, and (2) for retroactivity purposes, the weavers of the constitutional law web are not limited to the members of the Supreme Court, but also include Congress, the lower federal courts, and the personnel of the Immigration and Naturalization Service. The first assumption is inaccurate as a matter of fact; the second is wrong as a matter of law.

My brothers correctly state that the Immigration and Naturalization Service began establishing fixed checkpoints some distance from international boundaries in 1929. The information before us about those checkpoints is fragmentary. We do not know how many there were, where they were located, or which, if any of them, qualified as functionally equivalent to international boundaries. We also lack information about the kinds of searches, if any, that were conducted at them. However, we do know that any vehicle searches that were undertaken at points other than international boundaries were without color of statutory authority until 1946 when Congress enacted the precursor of 8 U.S.C. § 1357. (See Act of Aug. 7, 1946, ch. 768, 60 Stat. 865.)[3/] Although Congress thus

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1/ The phrase is taken from Mr. Justice Stewart's dissenting opinion in Milton v. Wainwright (1972) 407 U.S. 371, 381-82 n.2. See Desist v. United States (1969) 394 U.S. 244, 248 ("clear break with the past").

2/ "No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile. (Almeida-Sanchez v. United States (1973) 413 U.S. 266, 269.)

The Court has recognized, however, at least since Carroll v. United States (1925) 267 U.S. 132, that automobile travellers could be stopped and their vehicles searched "in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." (Id. at 154.) But nothing in Carroll, or in any other Supreme Court decision even implied that, for Fourth Amendment purposes, the Government could create portable boundaries or affix artificial borders wherever it chose.

3/ Congressional objectives in enacting the statute were stated in a letter from Attorney General Francis Biddle to the Chairman of the House Committee on Immigration and Naturalization that was incorporated in the Committee's Report and adopted by its Chairman as "quite completely" explaining the purposes of the bill. The letter clearly indicated that the Attorney General and the Committee believed that the Immigration and Naturalization Service lacked statutory authority to conduct searches away from the boundaries of the United States:

"HON. SAMUEL DICKSTEIN,
Chairman, Committee on Immigration and Naturalization,
House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN. This is in response to your request for my views relative to a bill (H.R. 386) to amend

(FOOTNOTE 3/ CONTINUED ON FOLLOWING PAGE)

(FOOTNOTE 3/ CONTINUED)

the law relating to the authority of certain employees of the Immigration and Naturalization Service to make arrests without warrant in certain cases and to search vehicles.

Under existing law arrests of aliens may be made without warrant only if the alien is entering or attempting to enter the United States in the presence or view of the arresting officer (43 Stat. 1049; 8 U.S.C. 110). Aliens illegally in the United States may be arrested only pursuant to a warrant issued by the Immigration and Naturalization Service. This limitation is cumbersome and at times results in frustrating the ends of justice. The power to make arrests in such cases without a warrant should be conferred on personnel of the Immigration and Naturalization Service with a restriction that an alien so taken into custody should be accorded a hearing without unnecessary delay.

It is also desirable to confer upon personnel of the Immigration and Naturalization Service the power of arrest in cases of violations of immigration laws, subject to the same limitations as those generally imposed on the right of an officer to make an arrest.

Existing law (43 Stat. 1049; 8 U.S.C. 110) confers on personnel of the Service the right to search vessels and vehicles for aliens being brought into the United States. This authority should be extended to cover aircraft, in the light of recent developments in aircraft transportation.

In the enforcement of the immigration laws it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and the legal right to do so should be conferred by law.

The bill under consideration embodies the foregoing suggestions and is similar to a bill (H.R. 5464, 78th Cong.) which was introduced at my request and was passed by the House of Representatives on December 4, 1944.

Accordingly, I recommend the enactment of the legislation.

I have been informed by the Director of the Bureau of the Budget that there is no objection to the submission of this report.

Sincerely yours,

FRANCIS BIDDLE, Attorney General."

H.R. Rep. No. 186, 79th Cong., 2d Sess. (1945), 1946 U.S. Code Cong. Service 1414.

PPI SANDSTONE 8-24-67 12SM 1808

eventually authorized checkpoint searches by Immigration and Naturalization personnel, congressional attention never focused on the constitutional difficulties engendered by the movable border concept that was included in section 1357. (See, e.g., H.R. Rep. No. 186, 79th Cong., 2d Sess., supra note 3.)

Fourth Amendment challenges to "alien" searches conducted by immigration and customs officials at places other than international boundaries were raised in the lower federal courts. The judicial response, however, did not rest on a comprehensive, critical analysis of the differences between searches at international boundaries and those conducted some distance from the border;[4/] rather, the law concerning checkpoint and roving patrol searches developed on a case-by-case basis, following the practice so familiar in other Fourth Amendment contexts. The end product of the evolution in this circuit was that section 1357 became a justification for the initial stop of a vehicle and the preliminary interrogation of the occupants at either a fixed checkpoint or elsewhere within a reasonable distance of the border; but probable cause was still required to validate a warrantless search of the vehicle, at least if the search went beyond that reasonably

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4/ When customs officers at a distance from the border conducted warrantless searches for narcotics, rather than for aliens, our circuit refused to uphold the searches in the absence of probable cause. (E.g., Contreras v. United States (9th Cir. 1961) 291 F.2d 63.) The Government's argument that 26 U.S.C. § 7607 eliminated the traditional probable cause requirement was rejected as contrary to the Fourth Amendment. (E.g., Plazola v. United States (9th Cir. 1961) 291 F.2d 56, 58-59.) These cases, of course, cannot be reconciled on constitutional grounds with the alien search cases commencing with Fernandez v. United States (9th Cir. 1963) 321 F.2d 283.

PPI SANDSTONE 8-24-67 12SM 1808

related to the discovery of aliens.[5/] Although these "alien" non-international boundary vehicle search cases were sometimes labeled "border searches," they were always a breed apart from searches actually conducted at international boundaries. The latter were treated as they always had been: no warrant and no probable cause were required to validate a thorough, full-scale search of the vehicle and its contents. The validity of warrantless, non-boundary "border searches" conducted without probable cause, on the other hand, was limited both in scope and in object.

Of perhaps greater moment for our retroactivity analysis, an examination of Ninth Circuit cases reveals that fixed checkpoint searches fared neither better nor worse than searches conducted at temporary checkpoints or by roving

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5/ We considered numerous cases involving alien searches conducted a substantial distance from an international border. A few, however, are illustrative of the development of the law in our circuit. In Fernandez v. United States (9th Cir. 1963) 321 F.2d 283, appellant was stopped at a fixed checkpoint by customs inspectors looking for aliens. Probable cause to believe marihuana was concealed in the vehicle developed during the stop. The constitutionality of 8 U.S.C. § 1357 was upheld, and the statute was applied to justify the initial stop of appellant's vehicle. Barba-Reyes v. United States (9th Cir. 1967) 387 F.2d 91 involved a stop and search similar to that in Fernandez. Again, the stop was justified under section 1357, and probable cause to search was found to exist following the stop. In United States v. Marin (9th Cir. 1971) 444 F.2d 86, a roving patrol stopped appellant's vehicle three miles from the border. The stop was upheld under section 1357; marihuana was discovered in plain view. The search at a fixed checkpoint in Valenzuela-Garcia v. United States (9th Cir. 1970) 425 F.2d 1170 was invalidated, however, because the search extended to an area too small to hide aliens and there was no probable cause to believe that contraband was hidden in the vehicle. Accord, United States v. Lujan-Romero (9th Cir. 1972) 469 F.2d 683.

The development of "alien" searches followed a similar pattern in the Tenth Circuit. (E.g., United States v. Anderson (10th Cir. 1972) 468 F.2d 1280; United States v. McCormick (10th Cir. 1972) 468 F.2d 68; see Roa-Rodriquez v. United States (10th Cir. 1969) 410 F.2d 1206.) But the Fifth Circuit created an expandible border concept that had only tangential relationship to the law emerging from the Ninth and Tenth Circuits. (E.g., United States v. McDaniel (5th Cir. 1972) 463 F.2d 129; Marsh v. United States (5th Cir. 1965) 344 F.2d 317.)

patrols away from the border. In all of these cases we approved initial stops pursuant to section 1357 and limited the scope of subsequent search activity. (See note 5 supra.) The assumption of my brothers that full-scale international boundary-type vehicle searches conducted at fixed checkpoints located away from the border had received long-continued judicial approval is not supported by the facts; my brothers' conclusion that Almeida-Sanchez sharply broke with prior law from the lower federal courts concerning fixed checkpoint searches cannot be sustained.

Even if the Ninth Circuit for many years had consistently upheld these alien searches at fixed checkpoints, however, that fact would not be pertinent to deciding whether retroactivity is in issue.[6/] For this purpose, the only "old" and "new" law that is relevant is the constitutional law enunciated by the Supreme Court. (See Robinson v. Neil (1973) 409 U.S. 505, 510.) A contrary rule would impair or destroy the uniform application of constitutional law in the several circuits, increase manifold the certiorari burdens of the Supreme Court, and erode the power of the Supreme Court as the ultimate arbiter of constitutional law.

These disturbing consequences might not occur if all circuits simultaneously decided constitutional questions and always decided them the same way. But they do not. The question of the constitutionality of fixed checkpoint searches at issue in the case at bench provides an excellent illustration of the problems that can arise under my brothers' views. The issue arose at different times with different frequency

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6/ I fully recognize that if the retroactivity doctrine were properly in issue, lower court decisions and law enforcement officers' reliance upon them would be relevant considerations in deciding whether to apply a particular Supreme Court decision retroactively. (E.g., Stovall v. Denno (1967) 388 U.S. 293.)

in some circuits and in others did not arise at all. In the circuits where the issue was never decided, did Almeida-Sanchez state a "new" rule? Is a single decision in one circuit upholding the search enough to create "old" law with which Almeida-Sanchez broke? If one circuit had upheld such searches and another had struck them down, would Almeida-Sanchez be retroactive in the latter circuit and nonretroactive in the former?7/ To prevent restrictions on the retroactivity of its decisions, must the Supreme Court take every new search and seizure issue to prevent "old" law from accumulating? If the Court is in any respect bound by the constitutional law developed in the lower federal courts, how can it continue to be the final arbiter of constitutional issues?8/

Even when the retroactivity concept is confined exclusively to law stated by the Supreme Court, difficult jurisprudential problems are generated. (See, e.g., Desist v. United States (1969) 394 U.S. 244, 256-69 (Harlan, J., dissenting).) To extend the concept to embrace the law of the circuits would turn confusion into chaos.

7/ Even a clarifying Supreme Court decision would not necessarily prevent retroactivity problems from arising. For example, in light of Almeida-Sanchez, the Fifth Circuit has invalidated a search conducted at a checkpoint located 65 to 75 miles north of the Mexican border. (United States v. Speed (5th Cir. 1973) 489 F.2d 478.) If the views expressed in my brother Wallace's dissenting opinion concerning the applicability of Almeida-Sanchez to fixed checkpoints had gained the adherence of a majority of our court, would a subsequent decision by the Supreme Court affirming the Fifth Circuit decision create new law for the Ninth Circuit, while merely confirming old law in the Fifth?

8/ The difficulties created by the view that circuit decisions can establish "old" law are multiplied greatly if unappealed district court decisions also produce old law. Yet the rationale of my brothers' opinions is not in any way limitable to circuit decisions. Moreover, deciding issues of federa constitutional law is not solely the prerogative of federal courts. Can the judiciaries of 50 states also create old law from which the Supreme Court departs when it reaffirms established constitutional principles and refuses to countenance a deviation sanctioned by the decisions of one or more state courts?

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CHAMBERS, Circuit Judge, concurring and dissenting:

I concur and dissent as indicated above.

I adhere to my original position that these Almeida-Sanchez cases should not have been taken en banc. See United States v. Bowen, _____F.2d_____.

United States Circuit Judge

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

Appendix "B" - Continued

Search without warrant

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search.

8. C.F.R. §287.1(a)(2)

Reasonable Distance.

The term "reasonable distance" as used in Section 287 (a)(3) of the Act, means within 100 air miles from any external boundary of the UnitedStates or any shorter distance which may be fixed by the District Director, or so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

LAW OFFICES
NASATIR, SHERMAN & HIRSCH
SUITE 510
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211
TELEPHONE (213) 653-3303

APPENDIX "B"

AMENDMENT IV - UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

TITLE 8, U.S.C. §1357 (a) and (c)

§ 1357. Powers of immigration officers and employees—Powers without warrant

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

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Supreme Court, U. S.
FILED
DEC 11 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN,

Petitioner,

—v.—

UNITED STATES,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. 10576

D.C. Judge Gordon Thompson, Jr.

Notice of appeal filed 10/6/71

485/1388
5000 Fd 960

462 Fed. Rep. 2nd. P 347

Date filed in DC—1/27/71

72-1012

EXPEDITED APPEAL

CRIMINAL—DC, SOUTHERN CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs

JOHN LEE BOWEN, DEFENDANT-APPELLANT

For Appellee: Harry D. Steward, US Atty

For Appellant: Michael D. Nasatir, Esq.

DATE 1972	APPELLANT'S ACCOUNT
Jan. 3	FP

DATE 1972	READY DATE: Feb. 14, 1972 FILINGS—PROCEEDINGS
Jan. 3	FILED NOV 17, 1971, APPELLANT'S MOTION FOR BAIL PENDING APPEAL. ORIG & 3. FP
Jan. 3	FILED DEC 6, 1971, ORDER (C & E) REQUESTING US ATTY TO RESPOND WITHIN 14 DAYS TO THE APPLICAION FOR BAIL FILED NOV 17, 1971.
Jan. 3	FILED DEC 10, 1971 APPELLANT'S AFFIDAVIT AND STATEMENT FOR THE RECORD IN SUPPORT OF APPLICATION FOR BAIL PENDING APPEAL TO: C & E.
Jan. 3	FILED ORIG CERT TRANSC OF RECORD ON APPEAL IN TWO VOLUMES, ORIG & 2 COPIES. VOL I: PLEADINGS. VOL. II: RPTR'S TRANSC. FILED ORIG EXHIBITS IN LPS. (Copy of two vol record sent to aplt counsel NASATIR by DC)
Jan. 3	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL.
Jan. 4	Set briefing schedule. Aplt brief due Jan 19, 1972. Aple brief due Feb 3, 1972. Aplt reply brief due Feb 8, 1972.
Jan. 21	FILED 5 APPELLEES BRIEFS
Feb. 7	FILED 25 APPELLEES BRIEFS
Feb. 14	FILED RESPONSE OF APPELLEE TO MOTION FOR BAIL. (Recvd. 12/30/72) see order
Feb. 14	FILED ORDER (C-E) Granting appellee permission to file late response to motion for bail and granting appellant's application for bail, etc. CALENDARED 4/7/72
Feb. 22	Recvd orig & 3 aplt reply briefs; sent F.L. #39, brief is late.

DATE 1972	FILINGS—PROCEEDINGS
Feb. 28	Filed orig & 3 of aplt's mot for late filing of reply brief and order therein. (M, G, McNichols) Copy of Late reply brief also sent to panel
Feb. 28	Filed order (M) granting leave to file Appellant Reply Brief.
Feb. 28	FILED 4 APPELLANTS REPLY BRIEFS (M G & McNichols)
April 7	CAUSE ARGUED & SUBMITTED TO MERRILL, GOODWIN, CJJ, LYDICK, DJ bb
April 18	Recvd. letter of 4/11 from atty Nasatir re: domestic marijuana (panel)
June 16	ORDERED OPINION (PER CURIAM) FILED & JUDG TO BE FILED & ENTD (JN)
June 16	Filed opinion Affirmed (jn)
June 16	Filed & Entered Judgment (pn)
June 28	FILED ORIG & 24 OF APPELLANTS PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC. rh
July 24	Filed order (M & G, CJJ & Lydick, DJ) denying petition for rehearing and rejecting suggestion for rehearing en banc. rh
July 31	Filed orig & 3 appellant's application for stay of mandate (M) bb
Aug. 7	Filed order (M) staying issuance of mandate to August 24, 1972. Mc
Aug. 24	Filed orig. & 3 of appellant's application to stay the mandate to (M) -Mc-
Aug. 24	Recvd. motion as submitted to the S.C. for ext of time in which to file petition. rh
Aug. 25	Filed order (M) staying issuance of mandate to 9/7/72. -Mc-

DATE 1972	FILINGS—PROCEEDINGS
Aug. 28	Recvd. copy of pet for writ of cert as filed in the S.C. F
Sept. 5	Recvd SC Notice of 8/28 of filing of pet for cert SC #72-5329. ps
Sept. 7	Recvd letter of 9/6 from Sol Gen re: Matter docketed in SC. ps
Sept. 8	Recvd notification from Applt counsel Nasatir of docketing matter in SC. ps
1973	
July 3	Filed applts motion for bail (panel of 7/16—service 7/2/73) rh
July 23	Filed order (Hu & Cy) remanding cause to District Court for hearing to determine appropriate conditions of release, pending reconsideration of this appeal on remand from the Supreme Court.
July 26	Filed copy of S.C. order of 6/25/73 granting pet for writ of certiorari
July 26	Filed certified copy of judgment of the S.C. (6/25/73) vacating Court of Appeals & remanding to same for further consideration (panel). Prepared JS-34 Reopened case (jn)
Aug. 16	Filed orig & three of appellee motion requesting leave to file supplemental brief. (M G Lydick)
Aug. 20	Filed order (G) granting the filing of appellee supplemental brief. rh
Aug. 20	FILED ORIG & 24 APPELLEES SUPPLEMENTAL BRIEF. (panel) abs
Sept. 13	Filed orig & 3 appellant's motion for leave to file supplemental brief (Panel). bb
Sept. 13	FILED ORIG & 24 APPELLANTS SUPPLEMENTAL BRIEF. (panel) abs

DATE 1973	FILINGS—PROCEEDINGS
Oct. 23	Filed order (C,M,K,Br,D,E,Hu,W,T,Cy,G,W3,S) taking case en banc. Hearing set for December 11, 1973 at 1:30 p.m., Courtroom #1, San Francisco. If counsel desire to submit added briefs, such briefs must be filed by November 15, 1973. bb Judge Chambers will file a dissent.
Oct. 30	Filed dissent of Judge Chambers to the order of Oct. 23rd.
Nov. 14	Recvd orig & 3 of applt's motion for bail pending appeal (to C,G). ty
Nov. 16	Rec'd an orig. & 3 copies Applts. Supplemental briefs; sent C.O. 24 re additional copies cr
Nov. 15	FILED (25) SUPPLEMENTAL BRIEFS OF APPELLEE. cs (to all active Judges)
Nov. 21	FILED (25) SUPPLEMENTAL BRIEFS OF APPELLANT. (to all active Judges) cs
Nov. 30	Filed orig & 3 copies appellee's motion for permission to use display map at oral argument; to "C" cs
Dec. 4	Filed order (G): Applt John Lee Bowen to be admitted to bail in an amount and under terms to be fixed by the dist. court. ty
Dec. 6	Recvd orig & 13 copies appellee's add'l citations & 14 copies of opinion of the Dist. Ct. for the Southern Dist. in *USA* v. *BACA, et al.* (to all active judges) cs
Dec. 10	Recvd 4 copies of applts add'l citations; insufficient copies. ty
Dec. 11	Argued and submitted to the court en banc mi
April 15	Filed aple's motion to file additional authority (to C and all active judges) cl

DATE 1973	FILINGS—PROCEEDINGS
April 19	Filed Order (C) granting leave to file aple's add'l authorities. cs
April 26	Filed aplt's response to additional authority filed by aple on 4/18/74. (to all active judges). cl
1974	
May 9	ORDERED (PER CURIAM) OPINION FILED & PART I GOODWIN CPINION FILED & JUDGE WALLACE DISSENTING PART I OPINION & JUDGE WALLACE PART II OPINION & JUDGE GOODWIN PART II CONCURRING AND DISSENTING OPINION FILED & JUDG TO BE FINAL & ENTD etc
May 9	Filed opinion—Affirmed
May 9	Filed & Entered Judgment (jn)
June 3	ISSUED JUDGMENT TO CLERK OF DISTRICT COURT
June 17	Filed SC notice re: filing cert 6/7/74 SC #73-6848 tj
June 26	Recvd aplt's letter and notification of docketing case with the Supreme Court.
Oct. 25	Filed cert copy SC Order (10-15-74) granting petition for cert. sw

Form No. M-1

MINUTES OF THE UNITED STATES DISTRICT C
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs John [illegible] No. 10576

X Present ___In custody ___On bond ___O/R X IA

___ HON. J. EDWARD HARRIS X HON. HARRY R. McCUE
DEPUTY CLERK
___Millie Hargis
___Jean Hendricks
___Glenda Peden
___Patricia McRostie

Assistant U.S. Attorney

Attorney for defendant [illegible] Apptd __M __J X Retnd

Apptd __M __J __Retnd

Apptd __M __J __Retnd

PROCEEDINGS:

___Bail review Cont to ___Affirmed ___Reduced to

___Defendant not appearing, on mot US Atty, bond forfeited and B/W issue

___B/W recalled ___Forfeiture set aside ___Bond reinstated

X Arr continued to 2-1-71 @ 9:00 A.M.

___Defendant arraigned

___Defendant states T/N to be

___Set for Omnibus Hearing for

___Assigned to Judge and continued to
for ___Arr & Plea ___Disposition ___Motion and/or trial settg

___Arr and Plea) ___Guilty (count___) ___Not Guilty (count___)
)
___Change Plea) ___Nolo Contendre (Count___)

___Ref to P/O for I/R, and sentence continued to

___Hrg Rept P/O and sentence contined to

___OTHER:

JUDGMENT

___Imposition of sentence suspended and probation for ___years ___5010(a)

___Committed to custody Attorney General for
___Treatment and supervision under 5010(b)
___Imprisonment for a period of ___4208(a)(2) ___3651 jail type inst for

___Execution of (___Balance) sentence suspended and prob for

___Restitution ordered
___Fine $___on each count TOTAL FINE $
___Commtd pend pymt fine, exec stayed until
___On motion U.S. Atty ___remaining counts ___Indictment ___Info. dismissed
___Bond exonerated ___on surrender to Marshal ___upon payment of fine.

___OTHER

DATE 1-29-71 INITIALS
Deputy Clerk

BEST COPY AVAILABLE

Form No. M-1

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs John Lee Brown No. 10576

X Present ___ In custody X On bond ___ O/P ___ NA

HON. J. EDWARD HARRIS X HON. HARRY R. McCUE

DEPUTY CLERK
Millie Harris
Jean Hendricks
Glenda Poden
Patricia McRostie

L Goldberg
Assistant U.S. Attorney

Attorney for defendant Ted Olff Apptd ___M ___J ___Retnd

by J. Hagerstrom Apptd ___M ___J ___Retnd

Apptd ___M ___J ___Retnd

PROCEEDINGS:

___Bail review Cont to _____ ___Affirmed ___Reduced to _____

___Defendant not appearing, on not US Atty bond forfeited and B/W issue

___B/W recalled ___Forfeiture set aside ___Bond reinstated

___Arr continued to _____

X Defendant arraigned

___Defendant stated T/W to be

X Set for Omnibus Hearing for 2/25/71 2pm

___Assigned to Judge _____ and continued to _____
for ___Arr & Plea ___Disposition ___Motion and/or trial settg

___Arr and Plea) ___Guilty (count___) ___Not Guilty (count___)

___Change Plea) ___Nolo Contendre (Count___)

___P/I to P/O for I/R, and sentence continued to

___Hrg Rept P/O and sentence contined to

X OTHER: Def. Sec. appeared for this hearing only.

JUDGMENT

___Imposition of sentence suspended and probation for ___years ___5010(a)

___Committed to custody Attorney General for
___Treatment and supervision under 5010(b)
___Imprisonment for a period of _____ ___4208(a)(2) ___3651 jail type inst for _____

___Execution of (___balance) sentence suspended and prob for _____

___Restitution ordered
___Fine $_____on each count TOTAL FINE $_____
___Commtd pend pymt fine, exec stayed until
___On motion U.S. Atty ___remaining counts ___Indictment ___Info. dismissed
___Bond exonerated ___on surrender to Marshal ___upon payment of fine.

___OTHER

DATE 2/4/71 INITIALS _____
Deputy Clerk

8

Form No. 8

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. v. J. Brown No. 10576

X Present ___In custody X On bond ___O/R ___NA

___HON. J. EDW. HARRIS X HON. HARRY McCUE

Deputy Clerk
___Robert Robinson
___Donald Pellaton
X JEANNIE M. HENDRICKS

R Rissa
Assistant U.S.Attorney

Attorney for Defendant M. Masatsugi Apptd ___M ___J X Retnd

by Jo Hackman Apptd ___M ___J ___Retnd

(Spec) Apptd ___M ___J ___Retnd

VIOLATION X 176(a) ___174 ___1325 ___545 ___

PROCEEDINGS:

OMNIBUS HEARING ACTION TAKEN FORM SUBMITTED ____

___Motion to dismiss Set for Hrg _____

___Motion to Sever Set for Hrg _____

___Motion to Suppress Set for Hrg _____

___Motion to Reveal Informant Set for Hrg _____

___Other Motions Set for Hrg _____

X Hearing continued to 3/25/71 10 am

___Continued for disposition to

___Trans. to Judge _____ for Disposition

___Trial ___Call
___Settg. _____

___Guilty plea entered
___Ref to P/O for I/R, Sent. contd to _____

___BAIL
___ Reduced to

___ Motion for reduction of bail denied

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Form No. 8

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. v. J. Bowen No. 10576

X Present ___In custody X On bond ___O/R ___NA

___HON. J. EDW. HARRIS X HON. HARRY McCUE

Deputy Clerk
___Robert Robinson X ANNE M. HENDRICKS R. Ross
___Donald Pellatan Assistant U.S.Attorney

Attorney for Defendant _____ Apptd __M __J __Retnd
_____ Apptd __M __J __Retnd
_____ Apptd __M __J __Retnd

VIOLATION X 176(a) ___174 ___1326 ___545 ___

PROCEEDINGS:

OMNIBUS HEARING — ACTION TAKEN FORM SUBMITTED X

___Motion to dismiss — Set for Hrg _____
___Motion to Sever — Set for Hrg _____
___Motion to Suppress — Set for Hrg _____
___Motion to Reveal Informant — Set for Hrg _____
___Other Motions — Set for Hrg _____

___Hearing continued to

___Continued for disposition to

X Trans. to Judge Thompson for ~~Disposition~~ JTS; Mot to Disp'd 11/12/71 8:30 am

___Call
___Trial
___Settg. _____

___Guilty plea entered
___Ref to P/O for I/R, Sent. contd to _____

___BAIL
___ Reduced to

___ Motion for reduction of bail denied

X waiver of def. Pres. Inf filed.

10

Form No. 1

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. v. John Lee Bowen No. 10576

___Present ___In custody X On bond ___O/R ___NA
___HON. EDWARD J. SCHWARTZ ___HON. HOWARD B. TURRENTINE ___HON.
___HON. J. CLIFFORD WALLACE ___HON. GORDON THOMPSON, JR. ___HON.

Deputy Clerk: Reporter
___M. Zinn X Victor Kohler ___Gloria Prandle
___Richard I. Bellman ___ ___Jan Purples J. Brannigan
___Joel Mayer ___ ___Linda Strasser Asst. U.S. Attorney

Attorney for Defendant Michael D. Nusatir _Apptd _I.J _Retnd
_____ _Apptd _I.J _Retnd
_____ _Apptd _I.J _Retnd

PROCEEDINGS:

___Bail review ___Cont to _____ _Affirmed _Reduced to _____

___Defendant not appearing, on bail US Atty bond forfeited and B/W issue

___B/W recalled ___Forfeiture set aside ___Bond reinstated

___Waiver of Indictment filed ___Information filed ___Consent to Juv Delncy filed

___Arr and Plea continued to

___Defendant states T/C to be

___Arr and Plea) ___Guilty (count___) X Not Guilty (count___)
___Change Plea) ___Nolo Contendre (count___) ___Admit ___Deny Juv Delncy

___Trial ___call _____ X Continued to 5-11-71 4:30 for Pre Trial hrg
___setting For Disposition to 5-24-71 1:30
___Set for Omnibus Hearing for for hrg mots.

___Transferred to _____ for ___trial ___hearing motions

___Filed waiver of Jury Trial

___Def to P/O for I/R, and sentence continued to

___Jury Rept P/O and sent continued to

___Probation report waived (SEE JUDGMENT BELOW) ___Probation report sealed

___Revocation of probation ___Admit ___Deny ___Probation revoked
___continued on probation see Judgment below

___OTHER:

JUDGMENT ___Following Study

___Imposition of sentence suspended and probation for ___years ___5010(a)

___Committed to custody Attorney General for
___Observation and study ___5010(c) ___4208(c) ___4252
___Treatment and supervision under 5010(b)
___Imprisonment for a period of ___4208(a)(2) ___3651 Jail type inst for____

___Execution of (___Balance) sentence suspended and prob for _____

___Restitution ordered
___Fine $_____on each count TOTAL FINE $_____
___Commtd pend pymt fine, exec stayed until
___On motion U.S. Atty ___remaining counts ___Indictment ___Info. dismissed
___Bond Exonerated ___on surrender to Marshal ___upon payment of fine.

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Form No. 1

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. v. John Lee Bauer No. 10576

Present / In custody / On bond O/R / W/A
Hon. EDWARD J. SCHWARTZ / Hon. HOWARD B. TURRENTINE / Hon. LELAND C. NIELSEN
Hon. J. CLIFFORD WALLACE / Hon. GORDON THOMPSON, JR.

Deputy Clerk: C.N. Zinn / Richard I. Bellman / Hilvoy Dayer
Reporter: Victor Mohler / Gloria Prandle / Jan Burtles / Linda Strasser
Asst. U.S. Attorney: _____

Attorney for Defendant: WA _Apptd _I J _Retnd

_Apptd _I J _Retnd

_Apptd _I J _Retnd

PROCEEDINGS:

__Bail review __Cont to _____ _Affirmed _Reduced to _____

__Defendant not appearing, on not US Atty bond forfeited and B/W issue

__B/W recalled __Forfeiture set aside __Bond reinstated

__Waiver of Indictment filed __Information filed __Consent to Juv Delocy filed

__Arr and Plea continued to

__Defendant states T/N to be

__Arr and Plea) __Guilty (count__) __Not Guilty (count__)
__Change Plea) __Nolo Contendre (count__) __Admit __Deny Juv Delocy

__Trial __call __Setto 8-27-71 2:30 Continued to 6-14-71 1:30 for Disposition

__Set for Omnibus Hearing for

__Transferred to _____ for __trial __hearing motions

__Filed waiver of Jury trial

__Ref to P/O for I/R, and sentence continued to

__Hrg Rept P/O and sent continued to

__Probation report waived (SEE JUDGMENT BELOW) __Probation report sealed

__Revocation of probation __Admit __Deny __Probation revoked
__continued on probation see Judgment below

V OTHER: Vacate not date 5/24

JUDGMENT __Following Study

__Imposition of sentence suspended and probation for ___years __5010(a)

__Committed to custody Attorney General for
__Observation and study __5010(c) 4208(c) __4252
__Treatment and supervision under 5010(b)
__Imprisonment for a period of __4208(a)(2) __3651 jail type inst for____

__Execution of (__Balance) sentence suspended and prob for _____

__Restitution ordered
__Fine $_____on each count TOTAL FINE $_____
__Comtd pend pymt fine, exec stayed until
On motion U.S. Atty __remaining counts __Indictment __Info. dismissed
__Bond Exonerated __on surrender to Marshal __upon payment of fine.

Other

SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs John Lee Bauer No 10576

__Present / In custody / On bond O/R / W/A
__Hon. EDWARD J. SCHWARTZ / Hon. HOWARD B. TURRENTINE / Hon. LELAND C. NIELSEN
__Hon. J. CLIFFORD WALLACE / Hon. GORDON THOMPSON JR. /

Deputy Clerk: C.N. Zinn / Richard I. Bellman / Hilvoy Dayer
Reporter: Victor Mohler / R.L. Robinson / Kathleen Sullivan / Jan Burtles / Linda Strasser / Gloria Prandle

Asst. U.S. Attorney J. Brannigan

Attorney for Defendant Michael D. Nassios _Apptd _I J _Retnd

_Apptd _I J _Retnd

_Apptd _I J _Retnd

PROCEEDINGS:

__Bail Review __Contd to _____ __Affirmed __Reduced to ____

__Defendant not appearing, on not US Atty bond forfeited and B/W issue

__B/W recalled __Forfeiture set aside __Bond reinstated

__Waiver of Indictment filed __Information filed __Consent to Juv Delocy filed

__Arr and Plea continued to

__Defendant states T/N to be

__Arr and Plea) __Guilty (count__) __Not guilty (count__)
__Change Plea) __Nolo Contendre (count__) __Admit __Deny Juv. Delocy

__Trial __call _____ Continued to 8-9-71 1:30 for
__Setto __For Disposition
hrg. motn.

__Filed waiver of Jury trial

__Ref to P/O for I/R and sentence continued to

__Hrg Rept P/O and sent continued to

__Probation report waived (SEE JUDGMENT BELOW) __Probation report sealed

__Revocation of probation __Admit __Deny __Probation revoked (SEE JUDGMENT)
__continued on probation

__OTHER:

JUDGMENT __Following study

__Imposition of sentence suspended and probation for ___ years __5010(a)

__Committed to custody Attorney General for
__Observation and study __5010(c) 4208 (c) __4252
__Treatment and supervision under 5010 (b)
__Imprisonment for period of ___ __4208 (a)(2) __3651 jail type inst for ____

__Execution of)__Balance) sentence suspended and prob for _____

__Restitution ordered
__Fine $_____ on each count TOTAL FINE $_____
__Committend pending payment fine, exec stayed until_____

__On motion US Atty __remaining counts __Indictment __Info. dismissed
__Bond Exonerated __on surrender to Marshal __upon payment of fine

OTHER

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MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs John L Bowen No 10576

Present In custody On bond O/R NA

Hon. EDWARD J. SCHWARTZ Hon. HOWARD B. TURRENTINE Hon. LELAND C. NIELSEN
Hon. J. CLIFFORD WALLACE Hon. GORDON THOMPSON, JR.

Deputy Clerk		Reporter	
U.N. Zinn	Victor Mohler	Kathleen Sullivan	Linda Strasser
Richard I. Bellman	R.L. Robinson	Jan Ruggles	Gloria Frandle
Hilvoy Mayer			

Asst. U.S. Attorney D. Hendricks

Attorney for Defendant M Nasatir Apptd H J Retnd

Apptd H J Retnd

Apptd H J Retnd

PROCEEDINGS:

Bail Review Contd to Affirmed Reduced to

Defendant not appearing, on not US Atty bond forfeited and B/W issue

B/W recalled Forfeiture set aside Bond reinstated

Waiver of Indictment filed Information filed Consent to Juv Delecy filed

Arr and Plea continued to

Defendant states T/I to be

Arr and Plea) Guilty (count) Not guilty (count)
Change Plea) Nolo Contendre (count) Admit Deny Juv. Delecy

Trial call Continued to
Sett'g For Disposition

Filed waiver of Jury trial

Ref to P/O for I/R, and sentence continued to

Hrg Rept P/O and sent continued to

Probation report waived (SEE JUDGMENT BELOW) Probation report sealed

Revocation of probation Admit Deny Probation revoked (SEE JUDGMENT)
continued on probation

OTHER: Hrg mot to suppress -- cont to 8-23-71 1:30

JUDGMENT Following study

Imposition of sentence suspended and probation for years 5010(a)

Committed to custody Attorney General for
Observation and study 5010(e) 4208 (c) 4252
Treatment and supervision under 5010 (b)
Imprisonment for period of 4208 (a)(2) 3651 jail type inst for

Execution of) Balance) sentence suspended and prob for

Restitution ordered
Fine $ on each count TOTAL FINE $
Committend pending payment fine, exec stayed until

On motion US Atty remaining counts Indictment Info. dismissed
Bond Exonerated on surrender to Marshal upon payment of fine

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs. John L. Bowen No. 10576

Present In custody On bond O/R NA

HON EDW J SCHWARTZ HON HOWARD B TURRENTINE HON G Thompson Jr

Deputy Clerk	Reporter	
U.N. Zinn	Gloria Frandle	S. C. H.
Richard I Bellman	Jan Ruggles	Assistant U.S. Attorney
Hal H Kennedy		
Mel Mayer		
Vic Mohler		

Attorney for Defendant Michael D Nasatir, Apptd Retnd
, Apptd Retnd
, Apptd Retnd

DATE AUG 23 1971 CRIMINAL MOTIONS (See part II for Wits & Exbs)

Hearing motion to suppress

Hearing motions -- granted in part & denied in part

GRANTED DENIED SUBMITTED CONTINUED TO

Date: COURT TRIAL (See part III for Wits & Exbs)

Waiver of Jury trial filed

Finding Guilty Non Guilty

Ref to P/O for I/R, and continued to for Sentence.

Probation Report Waived. (See Judgment following)

Other:

JUDGMENT

Imposition sentence suspended and probation 5010(a)

Committed to custody Attorney General for
Observation and study 5010(e) 4208(c) 4252
Treatment and supervision under 5010(b)
Imprisonment for a period of 4208(a)(2)

Execution of sentence suspended and probation for

Fine $ Restitution $

Bond exonerated

Other:

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MINUTES OF UNITED STATES DISTRICT COURT (Form No. 5)
SOUTHERN DISTRICT OF CALIFORNIA

PART II - EXHIBITS AND WITNESSES

9(54) vs. John Lee Bure. No. 10576

____ PLAINTIFF ____ DEFENDANT

NO.	IDENT.	EVID.	DESCRIPTION	WITNESS
				AUG 23 1971 GOVT
				Frank Artmeier
				AUG 23 1971 Defense
				John Bacon

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Form No. 4

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs John Lee Bure No. 10576

X Present (In custody) X (On bond) (O/R) NA

HON EDW J SCHWARTZ	HON HOWARD B TURRENTINE	X HON G Thompson Jr.
Deputy Clerk	Reporter	
W.N. Zinn	X Gloria Frandle	
Richard I Bellman	Jan Ruggles	Sheldon Gott
Hal H Kennedy		Asst U.S. Attorney
Mel Mayer		
X Vic Mohler		

Attorney for Defendant Michael D Pusateri, Apptd. X Retnd.
_____, Apptd. Retnd.
_____, Apptd. Retnd.

DATES OF TRIAL: AUG 27 1971 AUG 31 1971 _____ _____
& CONTINUED TO: AUG 31 1971 _____ _____ _____

JURORS IMPANELED AND SWORN

1. DENNIS G WOOD* 5. MARTHA OLDEN 9. LOIS G PATTERTON
2. PATRICIA A PAYNE 6. LOIS T BURCHARD 10. JEAN M KLUG
3. RAYMOND R BEHRENS 7. PHYLLIS A IRVINS 11. THEDA M LOKEY
4. LUCILE D MILLER 8. VINCENT SIRCHIA 12. DOMINICK GRIZZO

1st Alternate _____ 2nd Alternate _____

TRIAL PROCEEDINGS (See part II for Wits & Exbs)

8/31 ✓ Motion for judgment of acquittal ___granted ___denied ___submitted
8/31 ✓ 8-31-71 at 10:05 A.M.P.M. JURY RETIRES
✓ 8-31-71 at 4:30 A.M.P.M. JURY RETURNS
✓ VERDICT (✓) GUILTY ( ) NOT GUILTY ( ) POLLING WAIVED ( ) POLLED
___MISTRIAL ( ) Continued to _____ for ( ) Trial ( ) Setting
✓ Ref to P/O for I/R, and continued to 10-5-71 8:45 for sentence
___Probation Report waived (See Judgment following)
✓ Other: Bail remanded & bond exon.

JUDGMENT

___Imposition sentence suspended, Probation ____years ___5010(a)
___Committed to custody Attorney General for
___Observation and study ___5010(a) ___4208(c) ___4252
___Treatment and supervision under 5010(b)
___Imprisonment for a period of ___4208(a)(2)
___Execution of sentence suspended and probation for
___Fine $_____ Restitution $

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MINUTES OF UNITED STATES DISTRICT COURT (Form No. 5)
SOUTHERN DISTRICT OF CALIFORNIA

PART II - EXHIBITS AND WITNESSES

USA vs. John Lee Bauxer No. 10576

____ PLAINTIFF ____ DEFENDANT

NO.	IDENT.	EVID.	DESCRIPTION	WITNESS
1	AUG 27 1971	AUG 27 1971	Carton containing 12 tubes marihuana	AUG 27 1971 GOVT William A. Brinkley
1A	AUG 27 1971	AUG 27 1971	Carton containing 12 tubes marihuana	Frank Ortmeier
2	AUG 27 1971	AUG 27 1971	Carton containing funnel, sacks	Albert M. Myrann
3	AUG 27 1971	AUG 27 1971	Car rental agreement	Robert McKnight
4	AUG 27 1971		Photograph	
5	AUG 27 1971	AUG 27 1971	Small plastic bag pills	
A	AUG 27 1971	AUG 27 1971	Record	AUG 27 1971 D. Spence Frederick W. Brennan
B	AUG 27 1971	AUG 27 1971	"	
C	AUG 27 1971	AUG 27 1971	Fingerprint Cards	

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#1

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs John Lee Bauxer No 10576

✓Present ___In custody ___On bond ___O/T ___HA

___Hon. EDWARD J. SCHWARTZ ___Hon. HOWARD B. TURRENTINE ___Hon. LELAND C. NIELSEN
___Hon. J. CLIFFORD WALLACE ✓Hon. GORDON THOMPSON JR. ___

Deputy Clerk: ___T.N. Zinn ✓Victor Kohler ___Richard I. Bellman ___R.L. Robinson ___Hilvoy Mayer ___

Reporter: ___Kathleen Sullivan ___Jan Burgles ___Linda Strasser ✓Gloria Prandle ___

Asst. U.S. Attorney D. Hendrickson

Attorney for Defendant WA ___Apptd ___FI ___J ___Retnd

___Apptd ___FI ___J ___Retnd

___Apptd ___FI ___J ___Retnd

PROCEEDINGS:

___Bail Review ___Contd to ___ ___Affirmed ___Reduced to ___

___Defendant not appearing, on bot US Atty bond forfeited and B/W issue

___B/W recalled ___Forfeiture set aside ___Bond reinstated

___Waiver of Indictment filed ___Information filed ___Consent to Juv Delncy filed

___Arr and Plea continued to

___Defendant states T/W to be

___Arr and Plea) ___Guilty (count ___) ___Not guilty (count ___)

___Change Plea) ___Nolo Contendre (count ___) ___Admit ___Deny Juv. Delncy

___Trial ___call ___ ___Continued to ___
___Setting ___For Disposition

___Filed waiver of Jury trial

___Ref to P/O for R/R, and sentence continued to

___Rpt Rept P/O and sent continued to 11-15-71 10:30

___Probation report waived (SEE JUDGMENT BELOW) ___Probation report sealed

___Revocation of probation ___Admit ___Deny ___Probation revoked (SEE JUDGMENT)
___continued on probation

___OTHER:

JUDGMENT ___Following study

___Imposition of sentence suspended and probation for ___ years ___5010(a)

___Committed to custody Attorney General for
___Observation and study ___5010(c) ___4208 (c) ___4252
___Treatment and supervision under 5010 (b)
___Imprisonment for period of ___ ___4208 (a)(2) ___3651 jail type inst for ___

___Execution of) ___Balance) sentence suspended and prob for ___

___Restitution ordered
___Fine $___ on each count TOTAL FINE $___
___Committend pending payment fine, exec stayed until ___

___On motion DF Atty ___remaining counts ___Indictment ___Info. dismissed

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Form 1a MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs Calvin L. Bass No. 10576
✓ Present ✓ In Custody ___ On Bond ___ O/R ___ NA

___ HON. EDWARD J. SCHWARTZ ___ HON. HOWARD B. TURRENTINE
___ HON. J. CLIFFORD WALLACE ✓ HON. GORDON THOMPSON, JR.
___ HON. LELAND C. NIELSEN ___ HON.

Deputy Clerk	Reporter
___ W.N. Zinn	___ Kathleen Sullivan
___ Richard I. Bellman	___ Jan Ruggles
___ Milvoy Mayer	___ Linda Strasser
✓ Victor Mohler	✓ Gloria Frandle
___ Robert Robinson	___ Dorothy Albright
___ Donald Pellaton	

Asst. U.S. Attorney H Frank

Atty for Defendant Michael D Nantis ___ Apptd ✓ Retnd

_____ ✓ Apptd ___ Retnd

_____ ___ Apptd ___ Retnd

PROCEEDINGS:

JUDGMENT ___ Following study

43 ✓ Imposition of sentence suspended and probation for 5 years + conc w/cts #2.
___ 5010(a)
143 ✓ Committed to custody Attorney General for
___ Observation and study ___ 5010(a) ___ 4208(c) ___ 4252
___ Treatment and supervision under 5010(b)
✓ Imprisonment for period of 7 yrs ca at conc
___ 4208(a)(2) ___ 3651 jail type inst for _____
Defendant 1 _____
Defendant 2 _____
_____ Execution of (__balance) sentence suspended and prob for _____
___ Restitution ordered
___ Fine $_____ on each count TOTAL FINE $_____
___ Committed pending payment fine, exec stayed until _____
___ On motion U.S. Atty ___ Remaining counts ___ Indictment
___ Information dismissed
___ Bond exonerated ___ on surrender to Marshal ___ upon payment of fine
✓ Other BOND NOT EXON. Vacate order of 8-31-71 exonerating Bond.

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OCT 6 1971

MINUTES OF UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S.A. vs John Lee Bass No. 10576
___ Present ✓ In Custody ___ On Bond ___ O/R ___ NA

___ HON. EDWARD J. SCHWARTZ ___ HON. HOWARD B. TURRENTINE
___ HON. J. CLIFFORD WALLACE ✓ HON. GORDON THOMPSON, JR.
___ HON. LELAND C. NIELSEN ___ HON.

Deputy Clerk	Reporter
___ W.N. Zinn	___ Kathleen Sullivan
___ Richard I. Bellman	___ Jan Ruggles
___ Milvoy Mayer	___ Linda Strasser
✓ Victor Mohler	✓ Gloria Frandle
___ Robert Robinson	___ Dorothy Albright
___ Donald Pellaton	

Asst. U.S. Attorney D Hendricks

Atty for Defendant WA ___ Apptd ___ Retnd

_____ ___ Apptd ___ Retnd

_____ ___ Apptd ___ Retnd

PROCEEDINGS:

___ Bail Review ___ Cont to _____, ___ Affirmed, Reduced to _____

___ Defendant not appearing, on mot US Atty bond forfeited and B/W Issue

___ B/W recalled ___ Forfeiture set aside ___ Bond reinstated

___ Waiver of Indictment fld. ___ Information fld. ___ Consent to Juv Del. fld.

___ Arr and Plea continued to _____

___ Defendant states T/H to be

___ Arr and Plea ___ Guilty (count__) ___ Not guilty (count__)

___ Change Plea ___ Nolo Contendre (count__) ___ Admit ___ Deny Juv. Delqcy

___ Trial ___ Call _____ ✓ Cont to 10-19-71 9:45 for hrg
___ Sett ___ for disposition
wait to release Govt on appeal.

___ Filed waiver of jury trial

___ Ref to P/O for I/R, and sentence cont to

___ Hrg Rept P/O and sent continuted to

___ Probation report waived ___ Probation report sealed

___ Revocation of probation ___ Admit ___ Deny ___ Probation revoked
___ continued on probation ___ hearing continued

___ Attorney _____ relieved

___ Hrg on motions cont _____

___ On motion US Atty bond exonerated.

___ Other:

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U.S.A. vs [illegible] No. 10576

✓ Present __ In Custody __ On Bond __ O/R __ NA

__ HON. EDWARD J. SCHWARTZ __ HON. HOWARD B. TURRENTINE
__ HON. J. CLIFFORD WALLACE ✓ HON. GORDON THOMPSON, JR.
__ HON. LELAND C. NIELSEN __ HON.

Deputy Clerk	Reporter
__ W.N. Zinn	__ Kathleen Sullivan
__ Richard I. Bellman	__ Jan Ruggles
__ Milvoy Mayer	__ Linda Strasser
✓ Victor Mohler	✓ Gloria Frandle
__ Robert Robinson	__ Dorothy Albright
__ Donald Pellaton	

Asst. U.S. Attorney S. Catt

Atty for Defendant Michael O Nasatir __ Apptd ✓ Retnd

PROCEEDINGS:

__ Bail Review __ Cont to _____, __ Affirmed, Reduced to _____

__ Defendant not appearing, on mot US Atty bond forfeited and B/W Issue

__ B/W recalled __ Forfeiture set aside __ Bond reinstated

__ Waiver of Indictment fld. __ Information fld. __ Consent to Jur. Del. fld.

__ Arr and Plea continued to _____

__ Defendant states T/N to be

__ Arr and Plea) __ Guilty (count__) __ Not guilty (count__)
__ Change Plea) __ Nolo Contendre (count__) __ Admit __ Deny Juv. Dolqcy

__ Trial __ Call _____ __ Cont to _____
__ Sett __ for disposition

__ Filed waiver of jury trial

__ Ref to P/O for I/R, and sentence cont to

__ Hrg Rept P/O and sent continued to

__ Probation report waived __ Probation report sealed

__ Revocation of probation __ Admit __ Deny __ Probation revoked
__ continued on probation __ hearing continued

__ Attorney _____ relieved

__ Hrg on motions cont _____

__ On motion US Atty bond exonerated.

✓ Other: Mtg not to reduce bail on appeal -- another was issued (awaiting) ruling appeal bond at $25,000. o/s. Ordered to be reconsidered & an order filed reducing or affirming the $25,000 o/s appeal bond. Original W/S sent over.

DATE OCT 19 1971 INITIALS [illegible]

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1970 Grand Jury

No. 10576 Criminal

[Filed Jan. 27, 1971, Clerk, U.S. District Court, Southern District of California, Cynthia M. Freeman]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN LEE BOWEN, DEFENDANT

INDICTMENT

Title 21, U.S.C., Sec. 176a—Smuggling and Transporting Marihuana; Title 21, U.S.C., Sec. 331(q)(3)(B)—Possession of Depressant and Stimulant Drugs

The Grand Jury charges:

COUNT ONE

On or about January 19, 1971, within the Southern District of California, defendant JOHN LEE BOWEN, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 356 pounds of marihuana, which marihuana should have been declared; and knowingly imported and brought into the United States from Mexico said marihuana contrary to law, in that said marihuana had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459 and 1461; in violation of Title 21, United States Code, Section 176a.

RPR:mr
1-26-71

COUNT TWO

Title 21, U.S.C., Sec. 176a

On or about January 19, 1971, within the Southern District of California, defendant JOHN LEE BOWEN, with intent to defraud the United States, knowingly received, concealed, and facilitated the transportation and concealment of, approximately 356 pounds of marihuana, which marihuana, as the defendant then and there well knew, had been imported and brought into the United States contrary to law, in violation of Title 21, United States Code, Section 176a.

COUNT THREE

Title 21, U.S.C., Sec. 331(q)(3)(b)

That on or about January 19, 1971, within the Southern District of California, defendant, JOHN LEE BOWEN, did willfully and knowingly possess 158 benzadrine tablets in violation of Title 21, United States Code, Section 331(q)(3)(B) and 360a(C)(2).

A TRUE BILL:

/s/ Carl White
Foreman

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

By /s/ [Illegible]

Law Offices
NASATIR, SHERMAN & HIRSCH
Suite 806
9720 Wilshire Boulevard
Beverly Hills, California 90212
Telephone (213) 278-4584

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 10576

[Filed Jul. 28, 1971, Clerk, U.S. District Court, Southern District of California. By [Illegible], Deputy Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN LEE BOWEN, DEFENDANT

NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE PURSUANT TO RULE 41 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

To The Clerk Of The Above-Entitled Court And To The United States Attorney For The Southern District Of California:

PLEASE TAKE NOTICE that on August 9, 1971, at the hour of 1:30 P.M., in the United States District Court, Courtroom No. 1B, United States Courthouse, 325 West "F" Street, San Diego, California, defendant JOHN LEE BOWEN will move to suppress all evidence obtained by law enforcement officers in the above-entitled case.

Said motion will be made on the ground that the search and seizure of all evidence in the above-entitled case violated defendant's rights under the Fourth and Fifth Amendments to the United States Constitution, as well as his rights under Federal and State Law.

Said motion will be based upon the files and records in this case, this Notice of Motion and Motion, the Affidavit of John Lee Bowen submitted herewith, and the Memorandum of Points and Authorities attached hereto.
DATED: July 26, 1971.

Respectfully submitted,

/s/ Michael D. Nasatir
MICHAEL D. NASATIR of
NASATIR, SHERMAN & HIRSCH
Attorneys for Defendant Bowen

AFFIDAVIT OF JOHN LEE BOWEN

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

JOHN LEE BOWEN, being first duly sworn, hereby deposes and says:

1. That he is the defendant in the above entitled action.

2. That on or about January 19, 1971, affiant had been lawfully present in a 1970 Ford Pickup Camper on highway 86 near Salton City. At approximately 10:00 P.M. agents of the Federal Government conducted a search of this camper without a search warrant.

3. Affiant is informed and believes, and in reliance thereon alleges that said search was without probable cause; without lawful warrant as required by the Constitution of the United States; and violated defendant's rights under the Fourth Amendment to the United States Constitution.

DATED: June 8, 1971.

/s/ John Lee Bowen
JOHN LEE BOWEN
Affiant

SUBSCRIBED AND SWORN to before me this 8th day of June, 1971.

/s/ Victor Sherman
Notary Public

[SEAL]

Official seal, Victor Sherman, Notary Public—California. Principal office in Los Angeles County.

My Commission Expires May 10, 1974

MEMORANDUM OF POINTS AND AUTHORITIES

I

THE SEARCH OF DEFENDANT'S VEHICLE VIOLATED HIS RIGHTS UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES AND ALL EVIDENCE GAINED THEREFROM MUST BE SUPPRESSED.

In *Carroll* v. *United States*, 267 U.S. 132, 154, Chief Justice Taft said:

> "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come, and his belongings and effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

Absent constant surveillance of the vehicle from the time it crosses the border to the time of search, *see Castillo-Garcia* v. *United States*, 424 F. 2d 482 (1970), a search of a vehicle may not be upheld as a "border" search which allows a vehicle to be entered without probable cause. *See Contreras* v. *United States*, 291 F. 2d 63 (1961). Thus, without any history of suspicious behavior at the border followed by surveillance or pursuit, the government must justify the search on the ground that it was reasonable under the circumstances; that is, that the immigration inspector had probable cause to conduct the search. *Cervantes* v. *United States*, 263 F. 2d 800 (9th Cir. 1959).

The Court in *Cervantes*, *supra*, held that while the car was legally stopped in order to determine the nationality of its occupants, the subsequent search of that car could not be justified under the rubric of "probable cause."

In *Valenzuela-Garcia* v. *United States*, 425 F. 2d 1170 (1970), the Court held that although the driver of a car appeared nervous and showed a temporary alien pass to the inspector, there was not sufficient probable cause to allow a search of the vehicle. The Court cited *Contreras*, *supra*, and emphasized that where there was no logical connection between the examination of the vehicle and the determination of the driver's citizenship of any other occupant of the car, and absent probable cause, the search must be found unlawful and the evidence suppressed. In *Roa-Rodriguez* v. *United States*, 410 F. 2d (1969), immigration inspectors had arrested a non-resident alien about 90 miles north of the Mexican border. Noting that this was not a border search by customs officers at a point of entry or checkpoint, and that there were no suspicious actions by the occupants of the car at the border or otherwise, and no hot pursuit from the border, the Court held that a subsequent search violated the Fourth Amendment to the Constitution. The Court emphasized that the immigration inspectors were justified in stopping the car but not in conducting a general search for law violations. Citing *Plazola* v. *United States*, 291 F. 2d 56 (9th Cir. 1961), and *Contreras* v. *United States*, *supra*.

II

CONCLUSION

For the reasons cited above, the evidence obtained in the warrantless search of defendant's vehicle must be suppressed, and the indictment dismissed.

DATED: July 26, 1971.

Respectfully submitted,

/s/ Michael D. Nasatir
MICHAEL D. NASATIR of
NASATIR, SHERMAN & HIRSCH
Attorneys for Defendant

HARRY D. STEWARD
United States Attorney

ROBERT H. FILSINGER
Assistant U.S. Attorney
Chief, Criminal Division

SHELBY R. GOTT
Assistant U.S. Attorney
U.S. Courthouse
325 West F Street
San Diego, Calif. 92101
Telephone: 293-5619

Attorneys for Plaintiff,
United States of America.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 10576 Criminal

[Filed Aug. 6, 1971, Clerk, U.S. District Court, Southern District of California. By Cynthia M. Freeman, Deputy]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN LEE BOWEN, DEFENDANT

OPPOSITION TO MOTION TO SUPPRESS

Comes now the Plaintiff, UNITED STATES OF AMERICA, in opposition to the defendant's motion to suppress. Said opposition is based on the files and records

of this case as well as on the attached statement of facts and points and authorities.

DATED: August 6, 1971.

Respectfully submitted,

HARRY D. STEWARD
United States Attorney

ROBERT H. FILSINGER
Assistant U.S. Attorney
Chief, Criminal Division

/s/ Shelby R. Gott
SHELBY R. GOTT
Assistant U.S. Attorney

SRG/lld
8-6-71

STATEMENT OF FACTS

At about 10:00 p.m. on January 19, 1971, the defendant, John Lee Bowen, arrived at the regularly established immigration checkpoint on Highway 86, near Salton City, California, as the driver and sole occupant of a rented 1970 Ford pickup with a camper.

While checking the interior of the camper for illegal aliens, the officers detected the odor of marihuana.

Further search of the camper revealed 162 kilogram packages of marihuana under the mattress in the forward portion of the camper. The marihuana was also covered with burlap bags that were from Mexico.

Search of Bowen's clothing incidental to the arrest disclosed 158 benzedrine tablets in his jacket pocket.

POINTS AND AUTHORITIES

Immigration officers are empowered by statute to stop and search vehicles for aliens without probable cause within 100 air miles from any external boundary of the United States.

Title 8, United States Code, Section 1357(a)(3);
Title 8, C.F.R., 287.1;
Fernandez v. *United States* (9th Cir. 1963), 321 F.2d 283;
Miranda v. *United States*, 426 F.2d 283 (9th Cir. 1970);
Fumigali v. *United States*, —— F.2d —— (9th Cir. 1970).

If while performing these duties they smell the odor of marihuana, the officers then have probable cause to search for the marihuana.

Fernandez v. *United States, supra.*

CONCLUSION

The motion to suppress should be denied.

[5] SAN DIEGO, CALIFORNIA;
MONDAY, AUGUST 23, 1971

AFTERNOON SESSION

THE CLERK: 21 on calendar, 10576, U.S. vs. John Lee Bowen, for hearing motions.

MR. GOTT: Shelby Gott, in that matter.

(Discussion off the record.)

MR. NASATIR: Michael D. Nasatir for Mr. Bowen, your Honor.

THE COURT: Let's proceed.

MR. NASATIR: Your Honor, I believe it will be stipulated between the Government and defense that there was no warrant in this case, in which case it is the Government's burden.

THE COURT: All right. You may proceed, Mr. Gott, with your evidence.

MR. GOTT: Yes.

May it please the Court, very briefly, this is a Border Patrol check point case. I will call as my first witness Frank Ortmeier.

MR. NASATIR: Your Honor, I believe there are other witnesses in the courtroom. I would ask that they be excluded.

THE COURT: They may be excluded. Would you [6] please step outside before you are called.

FRANK R. ORTMEIER,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you take the stand, state your full name and spell your last name for the record, please.

THE WITNESS: Frank R. Ortmeier, O-r-t-m-e-i-e-r.

DIRECT EXAMINATION

BY MR. GOTT:

Q. Who do you work for?
A. Border Patrol in El Centro.
Q. How long have you been so employed?
A. Approximately four and a half years.
Q. Have you ever had occasion to meet a person you now know as John Lee Bowen?
A. Yes, sir.
Q. What date and time did you first meet Mr. Bowen if you recall?
A. About 10:05 p.m. on January 19 of this year.
Q. And what specifically were you doing when you first met Mr. Bowen?
[7] A. We were—my partner and I were holding down an Immigration check point at the junction of State Highway 86 and 78, which is between Brawley and Indio on Highway 86.
Q. Is that a regularly established check point?
A. Yes, sir. Most of the time, with the execption of a few shifts, while we are short handed we don't have men there.
Q. Is there some kind of a building at that check point?
A. Yes, sir, there is.
Q. Would you describe that very briefly.
A. A building which we call our office and we have a detention room in there. We write up aliens. It is approximately the size of this room here, this courtroom, and we have a little shack, so to speak, that we stand underneath to talk to in the vehicles who are coming through the check point.
Q. When the check point is open, are all vehicles required to stop?
A. Yes, sir, we have traffic cones on the highway which follows the traffic off the highway through our check point.
Q. What was the condition of traffic on this particular date, January 19, about 10:05 p.m.?

[8] A. The traffic was very slow at that point, hardly —I would say maybe one or two cars every 10 minutes or so.
Q. Would you estimate for us approximately how far from the California-Mexican Border this check point is as the crow flies?
A. As the crow flies, I would estimate about 45 miles.
Q. And do you know how far it is by highway?
A. 55 to 60 miles, I would guess.
Q. Where does this north-south road go that the check point is maintained on?
A. We check northbound traffic. It goes—if they turn left on State 78, they can go to Julian, California, or else up through Indio, Riverside, Los Angeles, and points north.
Q. On what highway would that be?
A. Highway 86.
Q. Now when you met the defendant, was he in a vehicle or on foot?
A. He was in a vehicle, in a 1970 Ford pickup with a camper.
Q. What direction was he traveling?
A. Northbound.
Q. Did you have some sort of signals or stop [9] signs or something prior to him coming to the check point that he would have passed?
A. There were about five signs warning the vehicles to keep to the right and not pass, and prepare to stop ahead at our check point. We have a very large stop sign with the red blinking lights on it.
Q. Did you observe anyone else in the vehicle?
A. No, sir.
Q. On arriving at your check point did you have a conversation with the defendant?
A. Yes. I identified myself as an Immigration Officer and asked him to state his citizenship, and he stated—I believe it was an American citizenship. However, I determined that he was an American citizen. I don't remember the actual words he told me.
Q. At least you became satisfied that he was legally in the country?

A. Yes, sir.
Q. Now, what did you do then?
A. I asked him to open up the back of the camper for a search for illegal aliens.
Q. Did he open the back of the camper?
A. Yes, he did.
Q. What did you observe, if anything, upon him [10] opening the rear of the camper?
A. First of all, I noticed a strong odor of marijuana coming from the back of the camper.
Q. What did you do at that time?
A. I got into the camper. There were no lights in the camper but I had my flashlight. I saw what appeared to be bedrolls or someone laying upon the mattress that is over the cab of the pickup.
Q. Are you referring to the cab-over, a portion of the camper?
A. Yes, sir.
Q. What did you do then?
A. I walked closer to it and shined the flashlight in there and it turned out to be two back-packs, I believe it was.

At the same time I notice what I observed to be kilo bricks, dark-blue cellophane-wrapped packages, stacked neatly underneath the mattress, and I could see about a three-inch portion of it between the edge of the mattress and the cardboard—not the cardboard, the plywood structure of the camper itself where the mattress lays on.
Q. Did you move the mattress prior to seeing those?
A. No, sir.
[11] Q. Was it in plain sight upon shining your light in that direction?
A. Yes, sir.
Q. Did you recognize those packages as something you had seen in the past?
A. Yes.
Q. What did they appear to you to be?
A. They appeared to be packages—kilos of marijuana.
Q. Did you perform any tests on those at that time?
A. Yes, sir, I took a key that I had hanging on my

belt and punched a hole in one of the packages and it appeared to me to be marijuana.
Q. Then what did you do, if anything?
A. I got out of the camper and placed Mr. Bowen under arrest and advised him of his rights to remain silent.
Q. You put him in handcuffs?
A. Yes, sir.
Q. And what then happened, if anything?
A. I then had called for assistance from my partner to come and help with the traffic and to take care of this matter.
Q. Was that Mr. Carosco who was working with you?
[12] A. Yes, sir.
Q. Was anyone else working with you at that check point at that time?
A. No, sir.
Q. Did Mr. Carosco come to the scene?
A. Yes, sir.
Q. What did you do then with the defendant, as far as Mr. Carosco is concerned, at that point?
A. First of all, I drove the vehicle—as soon as Mr. Carosco got there I drove the vehicle off to the side, while he observed Mr. Bowen and again, I think—as I can recall at this time, I advised him of his rights, again, to remain silent, and I proceeded to make a more thorough search of the camper and searched for contraband—
Q. (Interposing) What else did you find?
A. I found approximately 158 to 160 kilos of marijuana.

—also underneath the cupboards below the sink and the refrigerator and seats on both sides of the camper and found two or more burlap bags, I believe with the name "Product of Mexico" written on the burlap bags. And also, as I can recall at this time, I believe there was a jacket laying in the passenger compartment of the pickup with some pills in it. also [13] an aerosol tear gas can, a Kleenex box in the driver's compartment on the dashboard, along with a slip, a sales slip for a nine-millimeter pistol that had been purchased recently. I don't remember the exact date.

Q. Did you find any papers in there, about the vehicle, to show ownership of it?

A. Yes, sir. I found a rental agreement paper showing that that vehicle had been rented to Mr. Bowen.

Q. Did you find anything else of any consequence?

A. That I can recall at this time, no, sir.

MR. GOTT: Nothing further from this witness at this time, your Honor.

THE COURT: Mr. Nasatir.

CROSS-EXAMINATION

BY MR. NASATIR:

Q. I take it from your testimony the check point is shut down at certain times, is that right?

A. When we are short-handed, maybe once or twice a week through an eight-hour shift. We don't have enough men to keep it open.

Q. So approximately 16 hours a week it is not open, is that right, sir?

A. I can't give you an exact date. It just depends on how the schedule falls. I have no specific [14] knowledge of when it is open and when it isn't, only by searching through past records.

Q. I am not asking you for exactly. The red light—is that attached to a fixed piece of property, or is that portable, sir?

A. It is attached to a little building that we stand underneath for shade.

Q. So it is affixed to the building, is that right?

A. Yes. It is removed when we don't have the check point in operation.

Q. Do you remember what day of the week this arrest was, Mr. Ortmeier?

A. I don't remember what day of the week, no, sir. It was the 18th or 19th, as far as I can recall.

Q. Is the traffic fast or slow on different days of the week?

A. Yes, sir.

Q. And sometimes it is fast and sometimes it is slow, is that correct, sir?

A. Yes, sir.

Q. But you remember definitely of your own memory at this point that the traffic was slow on this particular day?

[15] A. Yes, sir, it was slow.

Q. But you don't remember the particular day of the week it was?

A. No, sir.

Q. Could it have been Sunday?

A. I don't know, sir.

Q. If it was Sunday, the traffic would have been fast, is that correct, sir?

A. Not necessarily so. It varies.

Q. Would you say that the traffic was heavier on Saturday or Sunday then other days of the week?

A. That again depends on if there is some activities in the Valley or sports events or something of that nature. It is rather hard to say, really.

Q. What highway is this check point on, sir?

A. Highway 86.

Q. Highway 86. Is there a connection into Highway 86 from San Diego?

A. Yes, sir. Interstate 8 intersects Highway 86.

Q. Interstate 8 leads directly to Highway 86, does it not?

A. Yes, sir. It is a Border Interstate.

Q. Excuse me, sir?

A. It is the Border Interstate, Interstate 8 [16] from San Diego through El Centro and on east to Yuma.

Q. So that the highway also comes—or is there a lead-in to Highway 86 from El Centro also?

A. Highway 86 goes right through El Centro.

Q. Right through El Centro?

A. Yes, sir.

Q. What other American cities does Highway 86 pass through, sir?

A. It originates—it goes through Heber. It goes through El Centro, Brawley, Imperial—Brawley—Westmoreland, Indio.

Q. Is it possible to get to your check point directly from San Diego, California, without passing through the Mexican Border?

A. Yes, sir, it is possible.
Q. Does your check point stop every car, sir?
A. Yes, sir.
Q. Every single car that goes through when you are open?
A. That again depends on the volume of traffic and the manpower that we have. Some people who we obviously know by sight who come through every day we don't stop, generally.
Q. There are people who you don't know who you don't stop, depending on the circumstances, though, is [17] that correct?
A. Depending upon the volume of traffic. Sometimes it is bumper-to-bumper and we are rather busy on holiday weekends.
Q. You check Mr. Bowen's citizenship when he arrived, is that right, sir?
A. Yes.
Q. You found nothing unusual, did you?
A. No, sir.
Q. And looking at the camper, there was nothing unusual about that, was there?
A. Not really, other than it appeared to be a rental camper.
Q. How did that appearance strike you, sir?
A. Well, there was nothing inside the camper other than a jacket and a—
Q. (Interposing) Prior to your looking inside the camper.
A. No, I am talking about the compartment where Mr. Bowen was sitting.
Q. The driver's seat, is that right, sir?
A. Yes, sir.
Q. Nothing in there other than what?
A. A Kleenex—well, a Kleenex box and jacket, it was later determined, but generally when a privately [18] owned car comes through they have all sorts of things in there.
Q. That would depend on the person, wouldn't it?
A. Right.

Q. A person neat and clean might have less than a person who was dirty, is that correct?
A. I guess.
Q. There is nothing really suspicious about there just being a jacket there, is that right?
A. No, sir.
Q. Nothing on the outside of the camper in the way of a sign of the source of that camper to identify it as a rental camper, was there?
A. Sometimes there are, but I didn't notice about this particular camper. They have a little sticker on the windshield.
Q. Other than the fact there was a jacket on the front seat with Mr. Bowen, there was nothing unusual about that camper, was there?
A. Not about the passenger compartment at that time, no.
Q. And Mr. Bowen got out of the camper willingly, did he not?
A. Yes, sir, I assume willingly.
Q. He cooperated with you in every way concerning [19] citizenship?
A. Yes, sir.
Q. He opened the door of the camper for you, did he not?
A. Yes, sir.
Q. Now as soon as he opened the door of the camper was it then that you smelled the marijuana?
A. Yes, sir.
Q. Where were you standing, sir?
A. I was standing right alongside of him when he opened it.
Q. You were outside the camper, were you not?
A. Yes, sir.
Q. You have to step up quite a ways to get inside the camper, do you?
A. Yes, sir.
Q. Isn't that correct? And you hadn't taken any steps up to the step up into the camper yet, had you?
A. No, sir.

Q. The door opens outside and prevents you from doing that, does it not?

A. Right.

Q. How far from the camper would you say you were when you smelled the marijuana, Mr. Ortmeier?

A. Less than three feet.

[20] Q. Okay. Was it old marijuana or fresh marijuana?

A. That is hard to say. I cannot say it was old marijuana. I can't distinguish the odor between old and new. I can distinguish what marijuana odor does smell like, though.

Q. Was it smoked marijuana? Can you distinguish between marijuana having been smoked and marijuana that hasn't been smoked?

A. Smoked and unsmoked marijuana, yes, I can distinguish those.

Q. Are they very distinguishable odors?

A. Yes.

Q. Was this wet marijuana or dry marijuana that you smelled?

A. If you are asking before I looked into the packages—

Q. Before you looked into the camper, sir.

A. I did not give it a thought.

Q. You didn't give it a thought?

A. No, sir.

Q. Now, you stated your smelled marijuana in other cases, Mr. Ortmeier. Have any of those cases gone to trial?

A. Yes, sir.

[21] Q. Approximately how many, sir? How many have resulted in convictions, let's make it?

A. I have several cases pending that are over a year old.

Q. Have any of your cases resulted in a conviction?

A. Yes, sir.

Q. How many of those, if you know?

A. I don't—I can't tell you for sure at this time. There have been several.

Q. What training have you had in the smell of marijuana, Mr. Ortmeier?

A. We don't have any specific training other than we have a Customs Agent come every once in a while to talk to new trainees and let them smell marijuana.

Q. Does he bring marijuana with him?

A. And look at other substances, yes.

Q. Does he bring marijuana with him?

A. Yes, sir.

Q. At these training sessions is it not a fact, sir, the agent allows you to smell marijuana from up close, is that correct?

A. Yes.

Q. He takes it up to you and you smell it [22] right in front of your nose, just about?

A. You can if you wish. You don't have to.

Q. Right. This agent does not go through a training period that allows you to smell marijuana from inside a vehicle and from the outside, does he, sir?

A. No.

Q. Mr. Ortmeier, after you entered the vehicle, was it then that you searched this drawer in the vehicle?

A. No, sir.

Q. What is the first thing you did after you entered the vehicle?

A. I walked to the forward points of the camper to determine what was on the bunk, or the bed-type, that is over the cab of the pickup.

Q. Were the lights on or off inside the vehicle?

A. They were off.

Q. Did you have your flashlight?

A. Yes, sir.

Q. Did you shine it up there, sir?

A. Yes, sir.

Q. How were the backpacks placed?

A. They were just laying on the bed.

Q. Were they alongside each other or on top [23] of each other? How, sir?

A. They were not on top of each other, no. I can't recall for sure. I can't tell you exactly how they were laying at this time.

Q. Did you really confuse those backpacks, Mr. Ortmeier, with a human being?

A. At first sight when I first stepped in the camper it could have been the body of a person laying there.

Q. Those backpacks?

A. Yes.

Q. Were the backpacks full or empty, sir?

A. They were empty but they were of the design that kind of held the canvas out, so to speak.

Q. They were in plain sight?

A. Yes, sir.

Q. Nothing covering them?

A. No, sir.

Q. Okay. When did you first realize they were backpacks? How far inside the door were you when you first realized they were backpacks and not a human being?

A. I made about two steps. After I stepped up into the camper about two steps toward the front of the camper.

[24] Q. Okay. And after you took those two steps you realized that they were not a human being but a backpack?

A. Right.

Q. After you stepped into the camper were you looking for human beings or were you looking for marijuana?

A. I was looking for human beings.

Q. Still looking for human beings?

A. Yes, sir. That is our primary purpose.

Q. After you took your two steps you determined it was not a human being on top of that mattress, is that right, sir?

A. Right.

Q. Now the mattress in that type of camper—could you hold up your hands and estimate approximately how thick that mattress portion is from the inside of the camper? Let me ask it this way. That mattress portion of the cab-over portion, as Mr. Gott calls it, is less than a foot wide, is that right, sir?

A. You mean the mattress itself?

Q. The mattress.

A. Where the mattress lays on the camper?

Q. Where the mattress lays on the camper, sir.

[25] A. How deep it is or how wide?

Q. How deep it is; less than a foot deep, is it not?

A. It is considerably less than a foot deep, I would say the edge that holds the mattress from sliding back is about that—was about that—

THE COURT: Indicating three or four—

THE WITNESS: —three or four inches deep.

BY MR. NASATIR:

Q. And that was the thickness, is that right, sir?

A. To hold the mattress, yes.

Q. And the mattress fits into that holder, does it not?

A. Yes.

Q. It doesn't extend over that holder, does it?

A. It is higher when—I would say it might have been an inch or two higher than that three or four-inch holder when it is placed down in there without anything underneath it.

Q. Now the mattress was placed down in there, is that right, sir?

A. It was laying in that area. It was not all the way down in.

[26] Q. Now how far above the holder is the mattress, then, Mr. Ortmeier, in this case?

A. The mattress—about an inch or an inch and a half of the mattress was actually below that three or four-inch space. However, it was about that far pushed ahead of that piece of the plywood that holds the mattress from sliding back.

Q. All right. Now the piece of plywood you are talking about is the holder, is it not?

A. Yes.

Q. So that what you are saying then—we are talking just about the deepness—that the mattress stuck up above the holder approximately two inches, is that right? Is that fair to say?

A. More or less.

Q. More or less two inches. So the total thickness, then, was five inches, is that right, sir?

A. I cannot tell you for sure how many inches. I mean I didn't measure it. It was immaterial to me at that time.

Q. You estimated about five inches?

A. More or less.

Q. Okay. Now then you say the mattress was pushed toward the front of the cab. Am I right, sir?

A. It was about two, three or four inches. [27] I don't recall at this time—further ahead from that thing that holds the mattress from falling on the floor in the camper.

Q. Right. So there was as much as a four-inch space between the mattress and the holder, is that correct?

A. More or less.

Q. More or less. Now how many steps, after the two steps that you took in and you discovered the backpacks were not human beings, did you have to take in order to reach that area, actually?

A. Like I say, the two steps that I took in there, I could see the kilo bricks.

Q. After taking two steps inside the cabin?

A. After taking two steps with the flashlight, and the flashlight just shined on them, before I determined what the backpacks were.

Q. Were not the kilo bricks in between the mattress and the mattress holder, sir?

A. Right.

Q. Were not the kilo bricks underneath the thickness of the plywood that comprises the mattress holder?

A. If you looked at the mattress at eye level you could not see the kilo bricks.

[28] Q. Okay. How far away from the mattress were you when you spotted these kilo bricks?

A. I would say one step, step and a half.

Q. A step and a half away?

A. Maybe. Maybe a step and a half at the most.

Q. These kilo bricks were not sitting on top of the mattress, were they?

A. No.

Q. Lying beside it, were they not?

A. They were lying underneath the mattress.

Q. Underneath the mattress?

A. Yes.

Q. The mattress was partially covering the kilo bricks?

A. Yes.

Q. What were the two kilo bricks wrapped in, sir?

A. In kind of a dark-blue cellophane plastic-type paper.

Q. You couldn't see through the dark blue cellophane?

A. No.

Q. They were covering bricks and you couldn't see into them?

A. Each individual brick was wrapped separately [29] from all the others.

Q. Right. You couldn't see inside the wrapping?

A. Inside the brick, no, without touching them.

Q. Right. How much of the bricks' surface would you say was showing?

A. Of each brick?

Q. Yes, sir.

A. I would say three to four inches of maybe eight or ten bricks.

Q. Three to four inches of eight or ten bricks, is that right?

A. Yes, sir.

Q. Three to four inches apiece?

A. Yes, sir. The bricks in order like this, about three inches or so of maybe eight or ten bricks. I didn't count how many I first saw.

Q. How wide is a brick of marijuana usually, sir?

A. Oh, I would say about four to five inches; six inches, maybe.

Q. Okay. Now how many bricks were underneath the mattress, Mr. Ortmeier?

A. Around 120, I believe it was.

Q. Was anything like burlap discovered with them?

[30] A. No, sir. The burlap bags and the rest of the marijuana was found underneath the cupboards, underneath the sink and refrigerator, and one of the seats, I believe.

Q. Was there any writing on any of the packages of these kilo packages?

A. The kilo packages?
Q. Yes.
A. Not to my knowledge.
Q. Okay. What did you do after you found these kilo packages?
A. After the first encounter?
Q. Yes, sir.
A. First of all, I called for my partner.
Q. Second of all?
A. After he arrived and he got the traffic moving again, we called Customs and told them we had an undetermined amount of contraband so that they would respond as fast as possible.
Q. Then what did you do? Did you discover the other 160 kilos underneath the cupboard?
A. The total of 160 more or less.
Q. You discovered them yourself?
A. Yes.
Q. Could you describe how they looked upon [31] discovery?
A. Underneath the cupboard they were stacked in there, as many as they could hold.
Q. Blue cellophane, is that right?
A. Yes, sir.
Q. And where was the burlap in relation to the blue cellophane kilos?
A. The burlap bags were in, I believe, as you are looking forward, the right-hand compartment in one of the cupboards.
Q. In one of the cupboards?
A. Yes.
Q. Those burlap bags were not physically present on the kilos of marijuana, were they, sir?
A. Yes, sir.
Q. All right. And what relationship were they? Were they wrapped in it?
A. No, the burlap bags were empty, laying on top of the kilos, some of the kilos, in the lower right-hand cupboard.
Q. Was there any other type of covering down there?
A. No, sir. There was a cupboard door.

Q. Were there any bags on anything else?
A. Not that I saw.
[32] Q. Did it look like these marijuana—excuse me. Did it look like these burlap bags were being used for anything in your opinion, or were they just laying on top of the kilos?
A. Do you want my opinion of what I thought they were?
Q. Were they laying just on top of the kilos?
A. Yes.
Q. Then you found some more underneath the seat, is that correct?
A. Yes, on the left-hand side. The seat was on the left-hand side, I believe.
Q. Were there any burlap bags underneath that seat?
A. No, sir. I don't believe there was on the left-hand side.
Q. What did the burlap bag say?
A. I believe it said—I believe one or possibly two of the bags said, "Product of Mexico." I can't be too sure about it. I believe that is as far as I can recall at this time, that is what they said.
Q. How many burlap bags were there, in all?
A. At least two. I am not sure whether there [33] were more or not.
Q. There were no burlap bags with the kilos discovered in the mattress?
A. Not underneath the mattress, no.
Q. Were there any burlap bags above the mattress?
A. No.
Q. Were there any burlap bags discovered underneath the seat?
A. Not to my knowledge, no.
Q. The only burlap bags you found were those that were used to cover those in the cupboard; is that right?
A. I don't know if they were used to cover the ones in the cupboard. They were laying on top.
Q. They were laying on top?
A. Like they had just been thrown in there.

Q. Now how many times have you gone through this course with the agent where he allows you to smell a brick of marijuana?

A. I believe I have been present twice. We don't really call them training sessions.

Q. Just an informal meeting-type thing?

A. Right. They put a notice on the bulletin board. Anyone wishing to come to this thing, they will have a Customs Agent in our squad room at a [34] certain date and time, and anyone who wants to partake in it can come. It is not compelled that we take it.

Q. Did you actually participate twice?

A. Yes, I believe it was twice.

Q. Actually smell marijuana twice?

A. Yes, sir.

Q. You had no training in Immigration Agents School, did you, in the smelling of marijuana?

A. I don't recall at this time whether—we had a few pills shown to us but I don't recall if we had marijuana at the Academy or not.

Q. If you did, you have forgotten about it at this time; is that right?

A. Yes, sir.

Q. And of course you are not a marijuana user or smoker yourself, are you, sir?

A. No, sir, I never have.

Q. Approximately how many trials have you testified in concerning marijuana, the smell of marijuana? Now I am limiting you to the smell of marijuana.

A. I would say at least a half a dozen trials.

Q. At least six trials?

A. Yes, sir.

[35] Q. Do you know whether these trials have proceeded to conviction?

A. Yes, sir.

Q. Have they been finally convicted?

A. Not all six of them, no. I can recall one case that was a spare-tire case that was dismissed.

Q. Right. It was dismissed, so now five cases you could testify to?

A. Yes.

Q. The rental contract was rented in Mr. Bowen's own name, was it not, sir?

A. Yes, sir.

Q. Did you check the address on the rental slip with the address on his driver's license?

A. If I did I don't recall at this time.

Q. You noticed nothing unusual then if you did?

A. This was after he had been placed under arrest. I did not look at his driver's license before he was arrested?

Q. I just have one final question.

Approximately how far, in terms of feet, would you say it is from the door of that camper to the place where the mattress holder is, sir?

A. Eight or ten feet, from the back door to [36] the front of the camper where the cab of the pickup fits back against the camper.

Q. Yes, sir.

A. I would estimate eight or ten feet. I am not sure. I couldn't say for sure.

Q. Did you find anything else that would indicate where this marijuana was from other than what you have already told us? Mr. Bowen made no statement, did he?

A. No, sir. He was even reluctant to give his name.

Q. But he gave you his name, did he not?

A. When Customs Agents arrived, yes.

Q. You didn't find a pistol, did you?

A. No.

Q. There was nothing other that would indicate that Mr. Bowen had come from Mexico, was there, other than what you have testified to so far?

A. No, sir, not to my knowledge.

MR. NASATIR: Nothing further, your Honor.

THE COURT: All right.

MR. NASATIR: With the Court's indulgence, may I have one more question?

THE COURT: Yes.

[37] BY MR. NASATIR:

Q. You discovered the pills in the coat, did you not, sir?

A. Yes, sir.

Q. You did yourself and you discovered all this marijuana yourself, did you? Is that right, sir?

A. Yes, sir, initially.

Q. Right.

Now the pills were discovered after the marijuana was discovered, is that correct?

A. Yes, sir.

Q. And the pills were where?

A. I can't be too sure at this time.

I believe it was in the passenger compartment of the truck, laying on the seat, in the middle of the seat.

Q. Are you absolutey sure about that?

A. I cannot be sure at this time. He was either wearing the jacket or else it was laying on the front seat.

Q. The pills were in a jacket, is that right?

A. Yes, sir, in a jacket pocket.

Q. Where was Mr. Bowen at the time that you found the pills? He was in custody, was he not?

A. Yes, sir.

[38] Q. He was immediately placed in custody upon your finding the marijuana in the mattress, is that right?

A. Yes, sir.

Q. He was in handcuffs?

A. What time are you referring to?

Q. At the time you found the pills he was in handcuffs?

A. Yes, sir. So it had to be in the compartment, the passenger compartment of the pickup.

Q. Lying on the seat?

A. Yes, sir.

Q. What were the pills contained in?

A. Customs Agents informed me that they were bennies.

Q. No. What were they contained in, sir?

A. In a kind of a plastic bag or a sandwich bag-type of deal, or something like that. I am not sure at this time.

Q. Could you describe very briefly how big a package the pills were in, in your best estimation?

A. About like a sandwich bag, something like it.

Q. How many pills were in there?

A. A medium-size handful of pills, about like [39] this.

Q. Indicating it was approximately three inches around?

A. Something similar to that.

Q. At most?

A. More or less. I cannot say for sure.

Q. Was it basically a round shape, is that correct?

A. As you hold the bag up, kind of an oblong shape, maybe.

Q. When you found it, had Mr. Bowen already been taken to the building?

A. Yes, sir.

Q. And when you found the rental contract with Mr. Bowen's name on it, had he already been taken to the building?

A. Yes, sir. The building is only a few feet away from where the camper was sitting. However, there is a window there so we can look out and observe our partner, our respective partners, checking the traffic coming through the check point.

Q. He was with your partner, was he not, Mr. Bowen?

A. When I found the pills?

Q. Yes. He was in your partner's custody?

[40] A. Yes.

Q. And the only thing that you discovered before Mr. Bowen was taken into custody was the marijuana in the mattress, am I right, sir?

A. Yes, sir.

MR. NASATIR: Nothing further, your Honor.

THE COURT: Anything further, Mr. Gott?

MR. GOTT: No, your Honor.

Government rests.

THE COURT: You may step down, sir.

Mr. Nasatir, do you have any evidence to produce at this time?

MR. NASATIR: Call the defendant for purposes of this motion.

THE COURT: All right.

JOHN LEE BOWEN,

the defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

THE CLERK: Take the stand. State your full name and spell your last name for the record, please.

THE WITNESS: My name is John Bowen.

[41] DIRECT EXAMINATION

BY MR. NASATIR:

Q. Mr. Bowen, were you present on January 19 of this year at 10:00 p.m. at the Customs—excuse me, at the Immigration Station on Highway 86?

A. Yes, I was.

Q. Did you see Mr. Ortmeier at that time?

A. Yes, I did.

Q. Mr. Ortmeier is an Immigration Agent, is that right, sir?

A. Yes.

Q. Now on that day, Mr. Bowen, had you been to Mexico at all?

A. No.

Q. And, Mr. Bowen, can you tell me what happened from the time—you met Mr. Ortmeier, is that correct, sir?

A. Yes.

Q. And what did he tell you?

A. He asked me what my citizenship was. I told him. He asked me if I would open up the back of the camper.

Q. Did you do so?

A. Which I did.

Q. Okay. Now prior to entering the camper—

[42] Did you open the door for Mr. Ortmeier?

A. Yes.

Q. Did he indicate to you that anything was unsuaul at that time?

A. No.

Q. And what then happened, sir, in your own words?

A. Well, then he got into the camper, and the first thing he did was open up—it was a chemical toilet, as you go right in on the righthand side. He opened that up. Then he went and opened up a few drawers. There is a seat on each side of the camper. There are some drawers above there. He opened those up.

Q. Did he ever indicate to you prior to that time that there was anything unusual about the camper?

A. No.

Q. Could you proceed, please?

A. Then he went through several drawers. There was a blanket on top of the mattress. He lifted that off.

Q. Was there anything else on top of the mattress?

A. No.

Q. Did you have a couple of knapsacks in [43] the back of the camper?

A. Yes. They were back under the seat by the table.

Q. How far is the seat and the table from the bed?

A. About seven feet.

Q. Were these knapsacks full or empty?

A. Empty. They were just laying there on the seat.

Q. And what was on top of that mattress?

A. Just a blanket, maroon blanket.

Q. What then happened, sir?

A. Well, he shined the light up on top of the blanket and then he lifted up the mattress.

Q. He lifted up the mattress?

A. Yes. He lifted up the blanket, then the mattress.

Q. What was under the mattress?

A. He said there were packages of marijuana.

Q. They were under—

A. He just turned around and said, "You are under arrest."

Q. After he lifted up the mattress?

A. Right.

MR. NASATIR: I have nothing further, your Honor.

[44] THE COURT: All right.

Which direction were you traveling in?
THE WITNESS: North.
THE COURT: Is this a side-entrance camper or a rear-entrance camper?
THE WITNESS: Rear entrance.
THE COURT: Mr. Gott, do you have anything?
MR. GOTT: Yes.

CROSS-EXAMINATION

BY MR. GOTT:

Q. Where had you been if you hadn't been to Mexico?
A. I was in Winterhaven.
Q. Did you smell any marijuana?
A. Did I smell any marijuana? No, I didn't.
MR. GOTT: Nothing further, your Honor.
MR. NASATIR: Nothing further, your Honor.
THE COURT: You may step down.
Mr. Nasatir, do you have anything to state to the Court in the way of any statements you desire to make?
MR. NASATIR: No, your Honor; only that I am sure this Court is well aware that an alien search must be for aliens.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 10576—Criminal

[Filed Aug. 31, 1971, Clerk, U.S. District Court, Southern District of California. By V. C. Mahler, Deputy]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN LEE BOWEN, DEFENDANT

VERDICT

We, the jury in the above-entitled cause, find the defendant, JOHN LEE BOWEN, guilty of smuggling marihuana as charged in count one of the indictment and guilty of transporting marihuana as charged in count two of the indictment and guilty of possession of depressant or stimulant drugs as charged in count three of the indictment.

/s/ [Illegible]
Foreman of the Jury

Dated: August 31, 1971
San Diego, California

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

No. 10576—Criminal

[Oct. 7, 1971, Clerk, U.S. District Court, Southern District of California, By V. C. Mohler, Deputy]

UNITED STATES OF AMERICA

v.

JOHN LEE BOWEN

On this 6th day of October, 1971 came the attorney for the government and the defendant appeared in person and [1] by counsel, Michael D. Nasatir.

IT IS ADJUDGED that the defendant upon his plea of [2] not guilty and a verdict of guilty has been convicted of the offense of smuggling marihuana in violation of 21 USC 176a as charged in count one of the indictment, transporting marihuana in violation of 21 USC 176a as charged in count two of the indictment, and possession of depressant or stimulant drugs in violation of 21 USC 331(q)(3)(B) and 360a(c)(2) as charged in count three of the indictment in three counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that on counts one, two and three the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on each of counts one and two the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] seven (7) years, said sentence as to counts one and two to run concurrently.

---

[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence [illegible]

IT IS ADJUDGED that on count three the imposition of sentence is suspended and defendant placed on probation for a period of five (5) years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation department, that he not possess or use narcotics, marihuana, LSD, or dangerous drugs in any form, that he not associate with known users of or dealers in narcotics, marihuana, LSD, or dangerous drugs in any form, that he not enter Mexico nor approach the Mexican border, and that he submit to search of his person or property at any time when requested by a law-enforcement officer, said probationary order as to count three to run consecutively and not concurrently with the sentence imposed as to counts one and two.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

WILLIAM W. LUDDY

By: /s/ V. C. Mohler
V. C. MOHLER
Deputy Clerk

Filed: October 6, 1971

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Trial Judge Hon. Gordon Thompson, Jr.

No. 10576 Crim.

[Filed Oct. 6, 1971, Clerk, U.S. District Court, Southern District of California. By [Illegible], Deputy]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN LEE BOWEN

NOTICE OF APPEAL

Notice is hereby given that John Lee Bowen defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the (check one)

(*) Final Judgment

( ) Order (describe)

entered in this proceeding on the 6 day of October 1971
Dated: 11-6-71

/s/ John L. Bowen

NOTES: NOTICE OF APPEAL MAY BE SIGNED BY:

(1) the defendant, or
(2) defendant's attorney, or
(3) the Clerk on instructions from the Court.

NAME AND ADDRESS OF ATTORNEY

_____

_____

_____

— Retained — Appointed

NOTE: Designation of Record must be filed within 5 days after the filing of the Notice of Appeal or counsel must appear for a conference with the Clerk on the 6th day. (*Mimeographed forms are available*)

Counsel must comply with the Federal Rules of Appellate Procedure. Particular attention is called to Rules 10, 11 & 12.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 105-76

[Filed Oct. 6, 1971, Clerk, U.S. District Court, Southern District of California. By [Illegible], Deputy]

UNITED STATES OF AMERICA, PETITIONER

vs

JOHN LEE BOWEN, DEFENDANT

In Pro Per
Attorney for Defendant

Howard B. Frank
Assistant U.S. Attorney

DESIGNATION OF RECORD ON APPEAL

The following documents indicated by a check (*) mark are hereby designated to constitute the Record on Appeal in the above case.

— Commissioner's/Magistrate's Record of proceedings including — Complaint — Warrant — Search Warrant — Other:

* Indictment or Information
* All Minutes of Court — O/H Action Taken From
* Government's Requested Instructions
* Defendant's Requested Instructions
* Court's Instructions (if filed)
* Verdict
* Judgment and Commitment
* Motions, Affidavits, etc. and Orders (if other than Minute Order) granting or denying.
* Suppress

— Production
* Dismiss
— Severance
— Other:
* Notice of Appeal
* Designation of Record on Appeal
— Other:
* All exhibits (except contraband)

REPORTER'S TRANSCRIPT

PLEASE CHECK ALL PROCEEDINGS TO BE INCLUDED IN TRANSCRIPT

— Arraignment and Plea
— Omibus Hearing
— Continuance
* Proceedings on Motions
* Voir dire interrogation of prospective jurors
* Opening statements
* Closing statements
* Instructions
* Sentencing

DATED: 10/4/71

/s/ Michael D. Nasatir
For John Bowen, In Pro Per
Attorney for Defendant

/s/ Howard B. Frank
Assistant U.S. Attorney

(6/24/71)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 10576

[Filed Oct. 6, 1971, Clerk, U.S. District Court, Southern District of California. By [Illegible], Deputy]

Plaintiff or Petitioner

vs

JOHN LEE BOWEN

Defendant or Respondent

AFFIDAVIT TO PROCEED WITH APPEAL
IN FORMA PAUPERIS

I, John Lee Bowen being first duly sworn, depose and say that I am the Defendant-Appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

i. Whether denial of Judgment of Acquittal was erroneous Absent evidence of Smuggling.

ii. Whether evidence was sufficient as to knowledge of importation.

iii. Whether evidence should have been suppressed.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. October 1970, 655/mo.

2. Have you received within the past twelve months and income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

i. _____

ii. _____

3. Do you own any cash or checking or savings account? Yes.

   a. If the answer is yes, state the total value of the items owned.
   $65—bank.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? _____

   a. If the answer is yes, describe the property and state its approximate value.

i. No.

ii. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

WHEREFORE affiant prays that he may proceed in forma pauperis pursuant to Title 28, USCA, Sec. 1915, and that counsel be appointed to prosecute his appeal. (Strike if inappropriate)

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Subscribed and sworn to before me this 6 day of Oct., 1971.

William W. Luddy, Clerk, U.S. District Court, Southern District of California.
Presented by:

/s/ John L. Bowen
Affiant

/s/ Michael D. Nasatir
Attorney for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 10576 Crim.

[Filed Oct. 11, 1971, Clerk, U.S. District Court, Southern District of California. By [Illegible], Deputy]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN LEE BOWEN, DEFENDANT

ORDER PERMITTING APPEAL IN FORMA PAUPERIS AND ORDER DIRECTING THAT EXPENSE OF RECORD ON APPEAL BE PAID BY THE UNITED STATES

IT IS ORDERED that the said JOHN LEE BOWEN be and he is hereby permitted to prosecute his appeal as a poor person without being required to prepay fees and costs of this court or the Court of Appeals, or give security therefor.

IT IS FURTHER ORDERED that the expense of printing the record on appeal, if such printing is required by the Appellate Court, be paid by the United States, pursuant to Title 28, U.S.C.A. § 1915.

IT IS FURTHER ORDERED that an original and two copies of the stenographic transcript be prepared for use of the defendant at the initial expense of the United States, pursuant to Title 28, U.S.C.A. § 753(f), to be paid from the appropriation of the Judiciary, Administrative Office U.S. Courts; and if the United States prevails on appeal, the costs of the appeal shall be taxed against the defendant.

IT IS FURTHER ORDERED that MICHAEL D. NASATIR, 9720 Wilshire Boulevard, Beverly Hills, California 90212, Telephone No. (213) 278-4584, is appointed counsel to prosecute said appeal; and counsel heretofore appointed for the trial is hereby relieved.

IT IS FURTHER ORDERED that bail pending appeal is set in the amount of $20,000 cash or corporate surety.
DATED: October 14, 1971.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

Copies to:

Petitioner—John Lee Bowen
Michael D. Nasatir, Esq.
9720 Wilshire Blvd., Suite 806
Beverly Hills, California 90212

U.S. Attorney

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 72-1012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN LEE BOWEN, DEFENDANT-APPELLANT

June 16, 1972

REHEARING DENIED JULY 24, 1972

The United States District Court for the Southern District of California, Charles M. Merrill, J., found defendant guilty of smuggling and transporting smuggled marijuana and of possessing depressant and stimulant drugs, and defendant appealed. The Court of Appeals held, inter alia, that question of the sufficiency of the evidence to support smuggling charge on count 1 did not have to be reached since the sentences on counts 1 and 2 were identical and concurrent.

Judgment affirmed.

Michael D. Nasatir (argued), of Nasatir, Sherman & Hirsch, Beverly Hills, Cal., for defendant-appellant.

Shelby R. Gott (argued), Asst. U.S. Atty., Stephen G. Nelson, Asst. U.S. Atty., Harry D. Steward, U.S. Atty., San Diego, Cal., for plaintiff-appellee.

Before MERRILL and GOODWIN, Circuit Judges, and LYDICK,* District Judge.

PER CURIAM:

John Lee Bowen appeals his conviction, following a jury trial, for violation of 21 U.S.C. 176(a) and 21

* The Honorable Lawrence T. Lydick, United States District Judge for the Central District of California, sitting by designation.

U.S.C. 331(q)(3)(B) (smuggling and transporting smuggled marijuana and possession of depressant and stimulant drugs).

While searching Bowen's rented camper for aliens, Immigration Officer Ortmeier first smelled and then found in the camper nearly 356 pounds of marijuana bricks of the type and packaged in the manner that usually comes from Mexico, along with backpacking equipment and burlap bags marked Product of Mexico. One hundred fifty-eight benzedrine tablets were found in the pocket of a jacket in the cab of the camper.

Questions raised on appeal are whether the search and seizure were lawful, whether there was sufficient evidence for the jury to conclude that the marijuana had been unlawfully imported by appellant and whether appellant knew it had been unlawfully imported when he transported it:

[1-3] The search and seizure were plainly lawful. The circumstantial evidence of knowledge of unlawful importation on Count 2 of the Indictment, though not overwhelming, was clearly sufficient to support the jury verdict. The questions of the sufficiency of the evidence to support the smuggling charge of Count 1 need not be reached since the sentences of Count 1 and 2 were identical and concurrent. United States v. Aranda, 9th Cir., 1972, 457 F.2d 761.

The judgment is affirmed.

No. 72-5329

JOHN LEE BOWEN, PETITIONER

v.

UNITED STATES

Facts and opinion, 462 F.2d 347.

June 25, 1973. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated and case remanded to the Court of Appeals for further consideration in light of Almeida-Sanchez v. U.S., —— U.S. ——, 93 S.Ct. 2535, 36 L.Ed.2d —— (1973).

UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

No. 72-1012

[Filed Oct. 23, 1973, U.S. Court of Appeals, ————, Clerk]

UNITED STATES OF AMERICA, APPELLEE

vs.

JOHN LEE BOWEN, APPELLANT

ORDER

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE and SNEED, Circuit Judges.

A majority of the judges of this court in active service have voted to hear the above case en banc on December 11, 1973, at 1:30 P.M. If counsel desire to submit additional briefs, such briefs must be filed in the Clerk's Office of this Court no later than November 15, 1973.

Argument will be in Courtroom No. 1 in the United States Court of Appeals and Post Office Building, Seventh and Mission Streets, San Francisco.

Circuit Judge Chambers will file a dissent to the foregoing order.

No. 72-1012

[Filed Oct. 30, 1973, U.S. Court of Appeals, ————, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN LEE BOWEN, DEFENDANT-APPELLANT

CHAMBERS, Circuit Judge, dissenting:

I dissent from the order for en banc. At issue is the retroactivity of *Almeida-Sanchez v. United States*, 411 U.S. 903 (1973). Also involved in *Bowen* under *Almeida-Sanchez* is the status of an intermittent but fixed checkpoint.

I would let the panel decide the case. None of the earmarks of the normal case for en banc are here.

It is inescapable that the Supreme Court will decide the questions here. They are too big and too far reaching for that Court to ignore them.

This en banc hearing results in about a three-months' delay in the case getting to the Supreme Court. Meanwhile, two or three district courts are almost choked with the retroactive question. Thus, knowing our decision means little in this instance, I was prepared to live with any decision the panel might render.

Taking this case en banc is simply flying off into the air without a payload.

/s/ Richard H. Chambers
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOHN LEE BOWEN, DEFENDANT-APPELLANT

[May 9, 1974]

Appeal From the United States District Court
For the Southern District of California

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE and SNEED, Circuit Judges

PER CURIAM:

This appeal is before the court upon the remand of the Supreme Court, *Bowen* v. *United States*, 413 U.S. 915 (1973), *vacating* 462 F.2d 347 (9th Cir. 1972).

Bowen was convicted of smuggling and transporting marijuana and of possessing depressant and stimulant drugs. The evidence of the violations was discovered during a routine search for illegal aliens of a camper truck at a permanent border-patrol checkpoint on California State Highway 86 approximately 36 air miles and 49 highway miles north of the Mexican border. Highway 86 is a principal route from Mexacali to Los Angeles by way of Indio and Riverside.

On June 21, 1973, the Supreme Court held in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), rev'g 452 F.2d 459 (9th Cir. 1971), that border-patrol agents on

roving patrol cannot stop and search cars pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1 without probable cause or warrant.

Two separate issues are presented here: (1) How does *Almeida-Sanchez* affect searches conducted at a fixed checkpoint? (2) If fixed-checkpoint searches, as well as roving-patrol searches, are included within the ambit of the *Almeida-Sanchez* ruling, should that ruling be applied to fixed-checkpoint searches conducted by border-patrol agents prior to June 21, 1973, in cases pending on appeal on that date?

For the reasons set forth in Part I of the opinion of the majority of the court here, we hold that the rule announced by the Supreme Court in *Almeida-Sanchez* does apply to searches at fixed checkpoints. However, for the reasons set forth in Part II, we also hold that *Almeida-Sanchez* will not be applied to fixed-checkpoint searches conducted prior to June 21, 1973.

The judgment of conviction is affirmed.

PART I

GOODWIN, Circuit Judge:

According to the Supreme Court in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), the government has been conducting three types of alien searches pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1: (1) searches at "[p]ermanent checkpoints * * * maintained at certain nodal intersections"; (2) searches at "temporary checkpoints * * * established from time to time at various places"; and (3) searches carried out by "roving patrols." 413 U.S. at 268. The government argued in *Almeida-Sanchez* that all these searches conducted "within a reasonable distance from any external boundary," 8 U.S.C. § 1357(a)(3), could be considered border searches, and thus be carried out with neither a warrant nor probable cause. *See Carroll* v. *United States*, 267 U.S. 132, 154 (1925).

The search condemned in *Almeida-Sanchez* was of the "roving patrol" type. It was conducted 25 miles north

of the Mexican border, on a California east-west highway that lies at all points at least 20 miles north of the border. 413 U.S. at 267-68, 273. The search of Bowen's camper, however, was a fixed-checkpoint search, a type of search reserved from the *Almeida-Sanchez* decision. The checkpoint, on California State Highway 86, was between the major population centers of the Imperial Valley and Indio.

The opinion [1] in *Almeida-Sanchez*, delivered by Mr. Justice Stewart, leases little doubt that traditional Fourth Amendment standards apply to fixed-checkpoint searches as well as to roving-patrol searches. Early in the opinion, after listing the three types of surveillance conducted by the Border Patrol along inland roadways and noting that the government argues that "[i]n all these operations * * * the agents are acting within the Constitution when they stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, and even without probable cause to believe the cars have made a border crossing," the Court stated that "[t]he only asserted justification for this extravagant license to search is § 287 of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357(a) * * *." 413 U.S. at 268.

[1] Mr. Justice Stewart's opinion is explicitly identified as "the opinion of the Court." It was approved by a majority of five justices, including Mr. Justice Powell, who stated, "* * * I join the opinion of the Court * * *." 413 U.S. at 275. Mr. Justice Powell has demonstrated elsewhere that he understands the difference between concurring in an opinion and concurring only in its results. *Compare Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 637 (1973) ("I concur in Part II of the Court's opinion * * *. As to Part I * * * I concur only in the result * * *.") *with Cleveland Bd. of Educ.* v. *LeFleur*, 42 U.S.L.W. 4186, 4192 (U.S. Jan. 21, 1974) ("I concur in the Court's result, but I am unable to join its opinion.") and *Frontiero* v. *Richardson*, 411 U.S. 677, 691 (1973), (concurring only in judgment). The language of Mr. Justice Powell's concurrence in *Almeida-Sanchez* strongly suggests that his concurrence was not limited to the result. Moreover, his concurring opinion was written primarily to elaborate his views on an issue not presented by the facts of *Almieda-Sanchez* and not reached by the other justices (*but see* 413 U.S. at 270 n. 3): whether a roving search would be sustainable if it were based on an area search warrant.

Moreover, the government in *Almeida-Sanchez* sought to justify roving-patrol searches on the basis of 8 U.S.C. § 1357(a)(3) and 8 C.F.R. § 287.1(a)(2). Here, the government seeks to justify the fixed-checkpoint search by reference to the same statute and regulation. But, when the Supreme Court held that this statute and regulation could not exempt searches carried out pursuant to them from traditional Fourth Amendment scrutiny, *see* 413 U.S. at 272, the government's statutory justification for fixed-checkpoint searches as well as for roving-patrol searches vanished.

Finally, at the very end of its opinion, 413 U.S. at 274-75, the Court quoted from *Carroll* v. *United States* as follows:

> "* * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * *." 267 U.S. at 153-54.

It would be strange indeed for the Court to quote this language if it meant to leave intact the government's asserted right to established fixed checkpoints anywhere within 100 miles of the border. Surely, searches at these checkpoints, like searches by roving patrols have the effect of violating the "right to free passage without interruption or search" of "those lawfully within the country * * *." Such searches, therefore, must meet constitutional

standards regardless of their utility in carrying forward the difficult mission of the Border Patrol.

To be sure, Mr. Justice Powell in his concurrence and Mr. Justice White in his dissent both correctly pointed out that *Almeida-Sanchez* did not present a question of a fixed-checkpoint search. *See* 413 U.S. at 275-76, 288. Nonetheless, these disclaimers do not override clear indications in the opinion of the Court that any distinction between fixed and movable checkpoints will be meaningless unless the distinction can be based upon reasoned Fourth Amendment considerations.

The government argues that there are, in fact, significant constitutional differences between roving patrols and fixed checkpoints. First, since fixed checkpoints often involve a stop and inspection of every car passing through them, they provide much less opportunity for the unfettered discretion of the police officer that was condemned in *Almeida-Sanchez*. See 413 U.S. at 268. Second, being stopped on a lonely road at night in a sparsely populated part of the country (*Almeida-Sanchez*) is more burdensome to the traveler than a stop at an identified and lighted checkpoint (*Bowen*). The government contends once again that the Constitution does not forbid all searches, but only "unreasonable" ones. In support of the validity of arguably "reasonable" fixed-checkpoint searches, the government cites a number of judicial decisions upholding roadblocks established for the purpose of checking drivers' licenses and registrations. *See, e.g.*, *United States* v. *Croft*, 429 F.2d 884, 886 (10th Cir. 1070); *People* v. *Washburn*, 265 Cal. App. 2d 665, 71 Cal. Rptr. 577, 581 (2d Dist. 1968); *State* v. *Smolen*, 4 Conn. Cir. 385, 232 A.2d 339 (App. Div.), *pet. for certification for appeal denied*, 231 A.2d 283 (Conn. 1967), *cert. denied*, 389 U.S. 1044 (1968); *State* v. *Severance*, 108 N.H. 404, 237 A.2d 683 (1968).[2]

[2] *But see Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875 (1973), in which the Supreme Court of Pennsylvania held that a routine check of a motor vehicle to determine whether it and its operator were properly licensed violates the Fourth Amendment. *See also State* v. *Cloman*, 254 Or. 1, 6 n. 2, 456 P.2d 67, 69 n. 2 (1969), in which the Supreme Court of Oregon expressly reserved

We agree with the government that a fixed-checkpoint search that does not entail significant delay is probably less offensive than a roving-patrol search. Being asked to stop at a fixed checkpoint is not frightening to a seasoned traveler. Being flagged over to the side of the road by a roving patrol might be traumatic. Also, an officer on roving patrol probably has more discretion in deciding which cars to stop than one stationed at a fixed checkpoint, although the difference might be less than the government contends. Since not all vehicles passing through a checkpoint are stopped, and since not all vehicles stopped are searched, the officer at the checkpoint still retains a good deal of discretion to "single out" some travelers for stops or intrusive searches.

Nonetheless, even conceding that a fixed-checkpoint search might be less of an imposition on domestic travelers than a roving-patrol search, we are able to find nothing in the opinion of the Court in *Almeida-Sanchez* which suspends Fourth Amendment standards in dealing with immigration searches at fixed checkpoints.

Moreover, the government's reliance on judicial decisions upholding automobile stops for the purpose of checking drivers' licenses is misplaced. Although the government has cited only roadblock stops, there is a parallel line of decisions upholding roving-patrol stops to check for valid license and registration. *See, e.g.*, *Lipton* v. *United States*, 348 F.2d 591 (9th Cir. 1955); *State* v. *Ream*, 19 Ariz. App. 131, 505 P.2d 569 (Div. 1, Dept. B, 1973); *Leonard* v. *State*, 496 S.W.2d 576 (Tex. Crim. 1973). In other cases, courts did not even find the fact that the stop may have been at a roadblock rather than incident to a roving patrol significant enough to mention. *See, e.g*, *United States* v. *Lepinski*, 460 F.2d 234, 237 (10th Cir. 1972); *Myricks* v. *United States*, 370 F.2d 901 (5th Cir.), *pet. for cert. dismissed*, 386 U.S. 1015 (1967). Hence, since this line of vehicle-registration-check decisions was as relevant in *Almeida-Sanchez*

ruling upon "the right to stop and examine the driver's operating license or the right to stop at a general roadblock." *See generally* Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 Stan. L. Rev. 865 (1973).

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as here, we do not find these decisions to be an appropriate means for distinguishing Bowen's search from that of *Almeida-Sanchez*.

What is more, the rationale for the drivers'-license decisions will not support the government's position here. For example, in *Lipton* v. *United States*, *supra*, in which this court upheld a stop by a motorcycle police officer of a youth driving an automobile, we reasoned that there was no way for a police officer to determine that a driver had a valid license permitting him to operate a motor vehicle other than by stopping him and asking him to produce his license. We noted:

> "* * * A contrary holding would render unenforceable the State statute requiring that automobile drivers be licensed." 348 F.2d at 593.

We are not persuaded that laws prohibiting illegal immigration will be rendered similarly unenforceable should we deny to the government the power to stop and search automobiles, without probable cause or warrant, at fixed checkpoints.

We hold, then, that fixed-checkpoint searches, like roving-patrol searches, even though conducted within a "reasonable distance" from the border, are not necessarily exempt from the traditional Fourth Amendment requirement of a warrant or probable cause. This holding, however, merely shifts the focus of our inquiry. The opinion in *Almeida-Sanchez* does not require that a border search, to be constitutional, be at the border itself; rather, a legitimate border search may also be conducted "in certain circumstances" at the border's "functional equivalents." 413 U.S. at 272. The search conducted in the present case was obviously not at the border itself; nor was it at a "functional equivalent" of the border.

The "function" of the border checkpoint is to regulate border crossings. Thus, in attempting to clarify what would constitute a "functional equivalent" of the border, the Court in *Almeida-Sanchez* offered two examples:

> "* * * For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, *might be* functional equivalents of borders searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City *would clearly be* the functional equivalent of a border search." 413 U.S. at 272-73. (Emphasis added.)

These examples are then contrasted with the search conducted in *Almeida-Sanchez*:

> "* * * [T]he search of * * * [an] automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border, was of a wholly different sort * * *" 413 U.S. at 273.[3]

In other words, if a search takes place at a location where virtually everyone searched has just come from the other side of the border, the search is a functional equivalent of a border search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search. One need only contemplate the volume of domestic travel between Buffalo and Rochester, New York, to see why a checkpoint between those two cities could not be the functional equivalent of a border checkpoint even though the checkpoint could be less than twenty miles from an international border.

In addition to the two examples of a functional equivalent of a border search provided by the Court in *Almeida-Sanchez*, other examples may be drawn from two series of decisions of this court. Representative of the first line of authority is *Alexander* v. *United States*, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). In that

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[3] Mr. Justice Powell in his concurrence also noted: "The search here involved * * * was not a border search, nor can it fairly be said to have been a search conducted at the 'functional equivalent' of the border." 413 U.S. at 275-76.

case customs officials, acting upon a tip from an informer, placed the defendant's automobile under surveillance when it crossed the border, and kept it under almost continuous watch as it made suspicious movements through the streets of a border city. In holding that a subsequent search by customs officials was properly called a border search, the court stated:

> "Where * * * a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was aboard the vehicle at the time of entry into the jurisdiction of the United States * * *." 362 F.2d at 382.[4]

In a second line of our own cases, this court has treated a search north of the border as the equivalent of a border search, where it appeared with reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who had just crossed the border illegally. *See, e.g., United States* v. *Weil*, 432 F.2d 1320 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971), in which this court held:

[4] *See also United States* v. *Mejias*, 452 F.2d 1190, 1192-93 (9th Cir. 1971); *United States* v. *Terry*, 446 F.2d 579 (9th Cir.), *cert. denied*, 404 U.S. 946 (1971); *Castillo-Garcia* v. *United States*, 424 F.2d 482, 484-485 (9th Cir. 1970); *Bloomer* v. *United States*, 409 F.2d 869, 870-71 (9th Cir. 1969); *Gonzales-Alonso* v. *United States*, 379 F.2d 347, 379-50 (9th Cir. 1967); *Rodriquez-Gonzales* v. *United States*, 378 F.2d 256, 258 (9th Cir. 1967); *Leeks* v. *United States*, 356 F.2d 470, 471 (9th Cir. 1966); *King* v. *United States*, 348 F.2d 814, 816 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965); *Murgia* v. *United States*, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961), *cert. denied*, 376 U.S. 946 (1964).

> "* * * [I]f customs agents are reasonably certain that parcels have been (a) smuggled across the border and (b) placed in a vehicle, whether the vehicle has itself crossed the border or not, they may stop and search the vehicle. Similarly, if agents are reasonably certain that a person has crossed the border illegally, and has then entered a vehicle on this side of the border, we think that they may stop and search the vehicle and person. They can assume that he may have brought something with him." 432 F.2d at 1323.[5]

In both of these pre-*Almeida-Sanchez* lines of Ninth Circuit authority, as well as in the two examples offered by the Supreme Court in *Almeida-Sanchez*, although the search was not conducted precisely at the border, it still was directly related to a recent entry from across a border. *See United States v. Almeida-Sanchez*, 452 F.2d at 463 (dissenting opinion of Browning, J.), *rev'd*, 413 U.S. 266 (1973).

It is clear that the search conducted in the present case lacks the vital connection between the vehicle stopped and a reasonable certainty, or even a probability, that it or its contents had recently crossed an international border. The checkpoint was approximately 36 air miles and 49 highway miles north of the Mexican border. Several significant population centers and highways, including Interstate 8, a major east-west freeway that connects the Southwest with the West Coast, lie between the checkpoint and the border. Under these circumstances, border-patrol agents had no reason to believe that virtually all or even most of the cars passing through their checkpoint had recently, or ever, crossed the border. Moreover, there was neither the continuing surveillance from the border nor the dependable intelligence from other

[5] *See also United States* v. *Vigil*, 448 F.2d 1250 (9th Cir. 1971); *United States* v. *Markham*, 440 F.2d 1119, 1121-23 (9th Cir. 1971). *See generally* Note, *From Bags to Body Cavities: The Law of Border Search*, 74 Colum. L. Rev. 53 (1974); Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U.J. Int'l L. & Politics 93 (1972).

sources required to fit this case into the *Alexander* line of decisions; nor was there the reasonable certainty that the vehicle contained either recently smuggled goods or aliens required under the *Weil* line. *See United States* v. *Petersen*, 473 F.2d 874 (9th Cir. 1973); *United States* v. *Mitchell*, 472 F.2d 67, 68 n.1 (9th Cir. 1973). Hence, the record in this case clearly indicates that the search conducted was not the functional equivalent of a border search. Were the record more equivocal, we would not hesitate to remand the case to the district court for a determination of functional equivalency. Where the record is as clear as it is here, however, we see no need for a remand.[6]

At its last line of defense, the government argues that fixed checkpoint searches, even if not the functional equivalent of border searches, should be upheld simply because they are urgently needed. The government's difficulty in detecting and repatriating illegal aliens along our southern boundary needs no new documentation here. The short answer to this argument, however, is that necessity alone cannot override the Fourth Amendment's prohibition against unreasonable searches and seizures. A similar argument was made and rejected in *Almeida-Sanchez* itself. *See* 413 U.S. at 293 (dissenting opinion of White, J.). Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez* suggested that warrants based on area-wide conditions could be employed to resolve the contending interests of law enforcement and Fourth Amendment safeguards. 413 U.S. at 275-85; *see generally The Supreme Court—1972 Term*, 87 Harv. L. Rev. 55, 200-04 (1973). Since the government did not

[6] *Cf. United States* v. *King*, 485 F.2d 353 (10th Cir. 1973); *United States* v. *Maddox*, 485 F.2d 361 (10th Cir. 1973). Both cases held that a warrantless search, without probable cause, of an automobile at the checkpoint in Truth or Consequences, New Mexico, violates the Fourth Amendment unless a search at that checkpoint could be deemed the functional equivalent of a border search. Both cases were remanded to the district court for determination of that issue. However, beyond directing the district court to interpret the phrase as it was used in *Almeida-Sanchez*, the opinions offer no guidance in defining the functional equivalent of a border search.

seek such a warrant in this case, we need not now express an opinion on a hypothetical search conducted pursuant to a judicial warrant authorizing searches for a limited time at a specific checkpoint. We refer to Mr. Justice Powell's opinion here merely to suggest to the government that procedures less offensive to the Fourth Amendment than judicially unapproved checkpoint searches might be devised and implemented to supplement its program for enforcing immigation laws.

Our conclusion that *Almeida-Sanchez* is as applicable to fixed-checkpoint searches as to roving-patrol searches is consistent with that reached by the Court of Appeals for the Fifth Circuit in *United States* v. *Speed*, 489 F.2d 478 (5th Cir. 1973). There, the court held that a border-patrol search at a temporary checkpoint on a north-south highway approximately 65 to 75 miles north of the Mexican border was neither a border search nor a functional equivalent of a border search and, hence, was unconstitutional. The court commented, "The distinction between a checkpoint and a roving patrol is not important." 489 F.2d at 480.

Likewise, the Court of Appeals for the Tenth Circuit has held that a warrantless search, without probable cause, of an automobile at the checkpoint at Truth or Consequences, New Mexico, violates the Fourth Amendment unless a search at that checkpoint could be deemed the functional equivalent of a border search. *United States* v. *King*, 485 F.2d 353 (10th Cir. 1973); *United States* v. *Maddox*, 485 F.2d 361 (10th Cir. 1973).

We hold here that under the rule announced by the Supreme Court in *Almeida-Sanchez* the search of Bowen's camper truck violated the Fourth Amendment because the search was not the functional equivalent of a border search and was authorized neither by warrant nor by probable cause.

Judges Merrill, Browning, Duniway, Ely, Hufstelder and Trask concur in this majority opinion (Part I).

[Part I]

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent to Part I of the opinion pertaining to the applicability of *Almeida-Sanchez* to searches conducted at fixed checkpoints.

With one fell swoop, the majority in Part I hews down a law enforcement procedure used for 44 years to curtail the ever-increasing tidal wave of illegal aliens. The use of fixed checkpoints has been neither secret nor clandestine. The procedure has come before our court on numerous occasions [1] with no hint that the practice was constitutionally infirm. For us to reverse ourselves at this late date requires clear and convincing reasons. *See Smith* v. *United States*, 273 F.2d 462, 465 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960). I fail to see them in the majority decision. The only apparent change is the opinion, or better said opinions, in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). A careful analysis, therefore, is required to see if that case dictates our reversal of a long-standing and accepted police practice.

The majority concedes that *Almeida-Sanchez* is a case involving stops and searches by roving border patrol officers. But by some mystic bridging, it holds that *Almeida-Sanchez* also requires that we outlaw searches at fixed checkpoints. The Opinion of the Court was delivered by Justice Stewart and concurred in by Justice Douglas, Brennan and Marshall. That opinion becomes the majority only with the added vote of Justice Powell. Justice Powell wrote:

> *While* I join the opinion of the Court, which sufficiently establishes that none of our Fourth Amendment decisions supports *the search conducted in this case*, I add this concurring opinion to elaborate on my views as to the meaning of the Fourth Amendment in this context."

413 U.S. at 275 (emphasis added). Justice Powell's concurrence, therefore, adds a fifth Justice, and thus a

[1] See cases cited in note 1 of Part II of majority opinion, *supra*.

majority, only to that part of the Justice Stewart opinion which invalidates the type of search "conducted in [that] case"—a roving patrol search.[2]

This critical distinction is brought into even closer focus by Justice Powell's demarcation of the four areas where searches typically occur:

> [The search of Almeida-Sanchez' automobile] was not a border search, nor can it fairly be said to have been a search conducted at the "functional equivalent" of the border. *Nor does this case involve the constitutional propriety of searches at permanent* or temporary *checkpoints removed from the border* or its functional equivalent.

413 U.S. at 275-76 (emphasis added). Thus, one could infer from his statement that searches can constitutionally occur at (1) the border, (2) functional equivalents of the border, (3) permanent checkpoints and (4) temporary checkpoints. He emphasized that the search in question did not occur in any of the four categories. His concurrence, therefore, cannot be said to give any weight to projecting *Almeida-Sanchez* to cover searches for aliens at fixed checkpoints. He specifically and emphatically limited his concurrence to answering the question of "whether and under what circumstances the Border Patrol may lawfully conduct roving searches of automobiles in areas not far removed from the border for the purpose of apprehending aliens illegally entering or in the country." 413 U.S. at 276.

Our brothers of the Tenth Circuit were faced with a question similar to that presented in this case in *United States* v. *Bowman*, —— F.2d —— (10th Cir. Nov. 29, 1973), which involved a stop at a fixed checkpoint located

[2] In footnote 1 of Part I of the majority opinion, it is contended that Justice Powell's concurring opinion joins in the entirety of Justice Stewart's opinion. The grammatical structure of the sentence qualifies his statement. The majority quotes him, ". . . I join in the opinion of the Court . . . ." But he stated, "While I join in the opinion of the Court, . . . I add this concurring opinion . . . ." If he had joined without any qualifications, his concurring opinion would have been for naught.

a few miles north of Truth or Consequences, New Mexico. Although they arrived at their conclusion by an alternate route, they discussed the effect of *Almeida-Sanchez* on the validity of the initial stopping of the defendant's vehicle and held: "We therefore do not read the [*Almeida-Sanchez*] decision as challenging the right of immigration officials to make routine inquiries as to an individual's nationality."[3] The Tenth Circuit apparently has recognized that *Almeida-Sanchez* does not resolve the validity of immigration stops and searches at fixed checkpoints.

Ignoring the significance of Justice Powell's limited concurrence, the majority relies basically upon the language quoted by Justice Stewart from *Carroll* v. *United States*, 267 U.S. 132 (1925), and contends that that language demonstrates that *Almeida-Sanchez* also controls the question of searches at fixed checkpoints. However, here the majority falls into the trap of failing to realize that Justice Powell's concurrence does not necessarily make the language in the Justice Stewart opinion a pronouncement by a majority of the Court.

Because of the close fragmented vote and because Justice Stewart's opinion must be limited in application to roving patrols, great insight can be secured from the dissenting opinion of Justice White in which the Chief Justice and Justices Blackmun and Rehnquist concurred. Justice White, after noting that the Court in *Carroll* v. *United States*, 267 U.S. at 154, recognized that neither a warrant nor probable cause is required to stop and search at the borders, stated this right was undisputed in *Almeida-Sanchez*. He also, with the concurrence of the three other Justices, concluded: "Neither, apparently, is it

[3] —— F.2d at ——; *but see* United States v. King, 485 F.2d 353 (10th Cir. 1973), which invalidated a search at a fixed checkpoint unless it is a functional equivalent of a border. *Bowman, King* and United States v. Maddox, 485 F.2d 361 (10th Cir. 1973), suggest that our brothers of the Tenth Circuit may have adopted a two-step approach: The initial stop at the checkpoint and inquiry as to citizenship may be made without probable cause or a warrant; but if the officer is going to search beyond what is in plain view, he must be at a functional equivalent of the border or have probable cause.

disputed that warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border." 413 U.S. at 288. Thus, four Justices have specifically taken a position diametrically opposed to that adopted by the majority in this case. As Justice Powell has limited his opinion to the facts of the roving search, we are left to speculate as to his approach to the fixed checkpoint issue.[4] Suffice it to say that based on the *Almeida-Sanchez* opinion, four Justices have concluded that searches for aliens at fixed checkpoints are not constitutionally infirm and that there is no majority consensus to the contrary. I, therefore, fail to see how the majority in this case can draw comfort from the *Almeida-Sanchez* decision.

After concluding that the search of Bowen's vehicle could be justified if it were conducted at a "functional equivalent" of the border, the majority holds that as a matter of *fact*, this checkpoint is not a functional equivalent. Justice Stewart acknowledges in *Almeida-Sanchez* that border searches may be conducted at the functional equivalents of the border and gives us two examples. 413 U.S. at 272-73. But the examples give us precious little by way of definition. The majority attempts to expand that definition by referring to border extension cases where the vehicle involved has been under surveillance since it crossed the border, or where it is reasonably certain that persons had just illegally entered, or goods were just illegally smuggled into the United States. These cases are far different from checkpoint cases. They compare like apples and oranges. The only real assistance comes from the two examples in Justice Stewart's opinion. Yet, with this little guidance, the majority makes a factual *finding* that the checkpoint in this case was not a functional equivalent. How is this done? The majority merely states, based on "the record." The record in this case, however, only tells us where the fixed checkpoint is, how far it is from the border, that several highways

[4] It is noted that the four dissenters agree with Justice Powell that an area search warrant would satisfy the Fourth Amendment for a roving patrol. *A fortiori*, it would appear five Justices would also approve such a practice for fixed checkpoints.

intersect Highway 86 before the checkpoint, that there are several cities along the Highway before the checkpoint, that Bowen was stopped to see if any aliens were aboard his vehicle and that during the stop, contraband was discovered. There is no evidence as to the amount of traffic that comes through the checkpoint from the border area, the number of illegal aliens arrested at the checkpoint, or other information that would seem to bear on this question. The imprudence of deciding this issue on an incomplete record looms even larger in view of the fact that a district court, after taking extensive testimony, concluded that the Route 86 checkpoint was a functional equivalent of the border. *United States* v. *Baca*, —— F.Supp. —— (S.D. Cal. Jan. 3, 1974). We would be far better advised to test the majority's theories on a factual record such as that developed in *Baca* rather than to make factual assumptions which may or may not be correct.[5]

This leads to the real question: What test does the majority apply to determine whether a fixed checkpoint meets the strictures of the Fourth Amendment?

It says that the government cannot justify searches made at fixed checkpoints without a warrant or probable cause on the basis of 8 U.S.C. § 1357(a)(3) and 8 C.F.R. § 287.1(a)(2) because the statute and regulation were vitiated in *Almeida-Sanchez*. But, once again, the majority fails to realize that the Justice Powell concurrence limits the Opinion of the Court so that it cannot be construed to apply to fixed checkpoints. But even if one ignores the significance of Justice Powell's concurrence, Justice Stewart did not state that 8 U.S.C. § 1357(a) and the regulations issued pursuant to it were unconstitutional on their face, but merely that the statute could not vindicate a search that is otherwise in violation of the Fourth Amendment. Consequently, when the majority

[5] The Tenth Circuit, erroneously, I think, has also applied a limited Fourth Amendment test to a fixed checkpoint but did remand for a factual determination on the question of whether the checkpoint was a functional equivalent. United States v. King, 485 F.2d 353 (10th Cir. 1973); United States v. Maddox, 485 F.2d 361 (10th Cir. 1973).

invalidates searches at fixed checkpoints simply because they too are conducted pursuant to 8 U.S.C. § 1357(a) without independent consideration of whether such searches are reasonable under the Fourth Amendment, they bridge a gap overnight rather than sound legal reasoning.

After finding as a fact that the checkpoint on Highway 86 was not a functional equivalent (in spite of there being no record upon which such a conclusion could be based) and after holding that the statutory power has been dissolved by *Almeida-Sanchez* (when there was no majority of the Supreme Court so holding), the majority concludes that the Fourth Amendment was violated because (1) "the search was not the functional equivalent of a border search" and (2) it "was authorized neither by warrant nor by probable cause."[6] The majority's test is incomplete. Four Supreme Court Justices have concluded that warrantless searches for aliens without probable cause may be made at fixed checkpoints. Their test was one of balancing the appropriate interests to determine whether the search was reasonable. Such an approach does not preclude Fourth Amendment analysis, but applies it without requiring that the search satisfy artificial criteria. It focuses upon the balancing protections afforded by the Fourth Amendment, as reiterated by Justice White, dissenting in *Almeida-Sanchez*: "The Amendment's overriding prohibition is . . . against 'un-

[6] The majority would apparently require that an officer have probable cause to believe that a crime has been committed before a warrantless search would be allowed. Such a belief would allow him to make an arrest and conduct a search incident to that arrest. This ruling would, in effect, mean that no vehicle could be searched at fixed checkpoints for illegal aliens unless the officer first had probable cause to arrest the driver of the car or had obtained a search warrant. Since a search warrant, in the traditional sense, could not be obtained prior to the time when the vehicle reached the checkpoint, and since requiring the driver to wait for the officer to obtain a warrant would be an arrest, the checkpoints would be limited in their deterrent effect on illegal aliens. It is not clear whether the majority opinion would allow immigration officials to stop vehicles as they come through the checkpoints to ask the citizenship of the occupants. If so, the checkpoints could still have some deterrent effect.

reasonable' searches and seizures . . . ." 413 U.S. at 287-88. *See Cady* v. *Dombrowski*, 413 U.S. 433, 439 (1973). Whether or not a search is reasonable "depends upon the facts and circumstances of each case and . . . searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the results might be the opposite in a search of a home, store, or other fixed piece of property." *Cady* v. *Dombrowski*, 413 U.S. at 440, *quoting Copper* v. *California*, 386 U.S. 58, 59 (1967).

In addition, we should not overolook the fact that the law enforcement personnel were operating pursuant to a statute. In such a case, there is even more reason to apply the broad test of reasonableness. *See United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970).

Certain types of searches have been constitutionally approved as reasonable although they have been made without probable cause or a warrant. A careful analysis of areas where such searches have been upheld as reasonable within the meaning of the Fourth Amendment demonstrates persuasive reasons for the same approach in testing the constitutionality of stops and searches at fixed checkpoints. For example, in *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court concluded that such a search was reasonable after applying a test that balanced the interests of the individual in being free from invasions to his personal privacy against the interests of society in assuring the safety of its law enforcement officers. Under the circumstances of *Terry*, a pat-down without a warrant or "probable cause" was not considered unreasonable. Similarly in *Camera* v. *Municipal Court*, 387 U.S. 523 (1967), the Court upheld a non-objected-to[7] search to all structures in a certain area to enforce a building code in spite of the nonexistence of probable cause or a

[7] *Camara* is partially distinguishable due to the non-objected-to search but a similarity exists in that adequate warnings are given as one approaches a fixed checkpoint and a driver can stop (and may in some instances be able to turn around) rather than proceed if he objects to the fixed checkpoint stop. *See* United States v. Baca, —— F.Supp. at ——.

warrant. Once again, the balancing test of reasonableness was applied to measure "the need to search against the invasion which the search entails." *Id.* at 537.

Stops and searches similar to the one objected to by Bowen occur not infrequently and, in many instances, are necessary facets of our way of life. The complexity of our society requires such limited intrusions in order to protect the rights of the majority.[8] In these specific areas, as long as the stops and searches are limited in their scope to a proper objective and are not unreasonable, they satisfy the Fourth Amendment.

For example, all interstate motor carriers may be stopped for safety or other regulatory inspections. 49 U.S.C. § 304 and 49 C.F.R. § 396.5. Certainly, if contraband is discovered during such a search it could be used as evidence of the commission of a crime. Motor carriers are also stopped and weighed, which can be considered a limited search, as they enter a state. Such stops and searches have been upheld as legal. *Commonwealth* v. *Abell*, 275 Ky. 802, 122 S.W.2d 757 (Ky.App. 1938). Similarly, probable cause is not necessary to stop a vehicle to check for a valid driver's license and contraband found incident to such a stop is not the subject of an illegal search.[9] *United States* v. *Croft*, 429 F.2d 884 (10th

[8] In balancing the interests of the majority against the interests of the individual, it is necessary that before we uphold a warrantless search we give major consideration to whether requiring a warrant would frustrate the governmental purpose behind the search. Camara v. Municipal Court, 387 U.S. 523, 529 (1967). Since requiring a search warrant, in the traditional sense would in effect preclude the search of all automobiles at the checkpoints, this requirement has been satisfied in this case. However, some type of area search warrant, as suggested by Justice Powell, may be possible in the checkpoint situation. See note 3, *supra*. That alternative is not before us now.

[9] The majority notes the cases upholding stops for inspection of drivers' licenses and vehicle registration, but distinguishes them from stops at fixed checkpoints on the basis that if such stops were not allowed the driver's license and vehicle statutes would be rendered unenforceable, whereas the majority is "not persuaded" that the immigration laws would similarly be rendered unenforceable by this decision. The record in this case is not complete enough to allow us to determine what effect our decision will have on the

Cir. 1970); *Lipton* v. *United States*, 348 F.2d 591 (9th Cir. 1965). Another example is the routine searches of baggage and other personal effects of persons entering the mainland from Hawaii for infectious plants which has also been upheld as reasonable within the Fourth Amendment. *United States* v. *Schafer*, 461 F.2d 856 (9th Cir. 1972).

Perhaps the most obvious example is the limited search that all passengers on airline flights are subjected to before they are even allowed in the boarding areas. At least at one time, if the would-be passenger met additional criteria (supposedly objective but which were secretly held by officers and airline employees), he could be subjected to an even more detailed search. We have repeatedly held that evidence of a crime found in the course of such a search may not be suppressed on the theory that the search violates the Fourth Amendment. *E.g.*, *United States* v. *Doran*, 482 F.2d 929 (1973); *United States* v. *Davis*, 482 F.2d 893 (1973). When the interest of the public in being protected against the dangers of a highjacking were weighed against the intrusion, we concluded that such searches were reasonable.[10] As we stated in *United States* v. *Davis*, 482 F.2d at 910:

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enforcement of the immigration laws, but indications are that the adverse effects will be substantial. *See* United States v. Baca, —— F.Supp. at ——.

[10] In United States v. Davis, 482 F.2d 893 (9th Cir. 1973), we set forth the criteria necessary for such a search to be reasonable. We stated that (1) the search must be "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of a crime . . . ." 482 F.2d at 908. (2) The essential purpose of the search must be not to detect contraband or apprehend criminals, but "to deter persons carrying [weapons or explosives] from seeking to board at all." 482 F.2d at 908. (3) The scope of the search must be limited to meet reasonably the need. And (4) the person must have the choice of electing to submit to the search or to not board the flight. 482 F.2d at 913.

The search in this case satisfies these criteria. (1) Bowen was stopped as part of a routine check for illegal aliens proceeding to the interior of this country. Either all vehicles passing through the checkpoint were stopped or a limited number were stopped based upon objective criteria that would give the officer reasons to suspect that illegal aliens may be within the vehicle. United States v. Baca, —— F.Supp. at ——. (2) The primary purpose of the stop and the search was not to detect contraband or criminals, but rather to deter illegal aliens from attempting to flee to interior cities with large populations. *Id.* at ——. The stop and the search were conducted pursuant to a statute designed to regulate immigration rather than general law enforcement. (3) The scope of the search was limited to areas where a person may hide. Other areas were not searched until the officer had probable cause to believe a crime had been committed. And (4) the checkpoint was permanent, well-lighted and clearly identified. All persons proceeding through the checkpoint had reason to know that they would be questioned as to their citizenship and subjected to a limited search for illegal aliens. They had the alternative to stop or, in this case, to turn around.

[11] United States v. Baca, —— F.Supp. at ——.

> To pass constitutional muster, an administrative search must meet the Fourth Amendment's standard of reasonableness. "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, *supra*, 387 U.S. at 536-537, 87 S.Ct. at 1735.

I would not restrict the constitutional test in this fact situation as does the majority but would determine whether the search at this fixed checkpoint was unreasonable under the Fourth Amendment. The majority holds that:

> The opinion in *Almeida-Sanchez*, delivered by Mr. Justice Stewart, leaves little doubt that traditional Fourth Amendment standards apply to fixed-checkpoint searches as well as to the roving-patrol searches. (Footnote omitted.)

But there is a majority holding on the issue of roving patrols. There is a vast difference between a red-light, midnight stop on a lonely road and approaching a well-lighted, fixed checkpoint with warning signs and uniformed men plainly visible.[11] The majority's assumption that five of the Justices have or would apply the same standard in both is one I cannot accept.

Under the correct test, whether the search at this fixed checkpoint was unreasonable should be determined in the

first instance by the trial court after hearing all of the evidence. Such a determination is primarily factual. In applying this test the trial court would balance the rights of the individual vehicle driver against the interests of all the people of the country in stemming an avalanche of persons illegally crossing our borders.[12] Both Justices Powell [13] and White [14] refer to the Herculean challenges

[12] Many of the factors enumerated by Justice Powell as a prerequisite for an area search warrant might also be considered in determining whether there was an unreasonable interference with the individual's rights:

> [T]hey include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

413 U.S. at 283-84 (footnote omitted).

[13] The Government has made a convincing showing that large numbers of aliens cross our borders illegally at places other than established crossing points, that they are often assisted by smugglers, that even those who cross on foot are met and transported to their destinations by automobiles . . . . It would, of course, be wholly impracticable to maintain a constant patrol along thousands miles of border. Moreover, because many of these aliens cross the border on foot, or at places other than established checkpoints, it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country. Thus the magnitude of the problem is clear.

413 U.S. at 265-66.

[14] The external boundaries of the United States are extensive. The Canadian border is almost 4,000 miles in length; the Mexican, almost 2,000. Surveillance is maintained over the established channels and routes of communication. But not only is inspection at regular points of entry not infallible, but it is also *physically impossible* to maintain continuous patrol over vast stretches of our borders. The fact is that illegal crossings at other than the legal ports of entry are numerous and recurring.

413 U.S. at 293 (emphasis added).

faced by those directed to prevent illegal entries. Before we direct the Dutch boy to remove his finger from the dike, we owe it to the American people at least to balance their interests against the interests of the individual in being free from this limited intrusion.

While no one can give an accurate count, it has been estimated that there are approximately 800,000 to over 1 million illegal aliens in our country; approximately 85% of these are citizens of Mexico. *United States* v. *Baca*, —— F.Supp. at ——. The major problem is the abortive attempt to guard 2,000 miles of border with Mexico from the Gulf of Mexico to the Pacific coast.

In addition to aliens entering illegally, 91 million aliens entered the United States legally during the fiscal year 1972, with over 39 million of these entering directly into Southern California. *Id.* at ——. A large percentage of these visitors enter with temporary border passes, restricting them to a seventy-two hour stay and to travel within twenty-five miles from the border. *Id.* at ——; see 8 C.F.R. § 212.6. To enforce these restrictions, some type of investigation away from the border is required. The majority suggests that this flow of illegal aliens can be sufficiently regulated by alternative methods. But I suggest that we do not have sufficient information in this record to make that determination. Indications are that anything short of an Iron Curtain type border patrol would be ineffective in curtailing the number of illegal entries. *United States* v. *Baca*, —— F.Supp. at ——. Further, even stopping the illegal flow across the border would not halt those legally entering but illegally travelling more than twenty-five miles from the border. Therefore, while I agree with the majority that alternative methods of enforcement of the law should be included in the balancing approach, one district court found:

> The evidence presented before this court clearly established that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol, in the absence of the checkpoints, for even a geometric increase in its personnel or line watch would not leave any control over those admitted as temporary visitors from Mexico.

Id. at ——. Certainly from the record before us, we cannot make a contrary conclusion.

If we are to test the search in this case as to whether it is unreasonable under the Fourth Amendment, it would be necessary to remand the matter for a factual determination. The findings already made by one district court pertaining to the checkpoint where Bowen was stopped indicate that such would not be a fruitless exercise.[15] With an adequate factual record, we could

[15] In United States v. Baca, —— F.Supp. at ——, the trial judge made the following findings of fact:

The Border Patrol has established a checkpoint on Route 86 west of the Salton Sea National Wildlife Refuge just north of the intersection of State Route 78. This location is approximately 36 air miles and 49 road miles from the Mexican border. The checkpoint is bordered on the east by farm land extending for about three miles to the Salton Sea. To the west and south of this checkpoint lies desert.

At this location the Border Patrol has a building and traffic check signs together with blinker lights. A power source is located at the facility. The signs are of the usual type and the floodlights at night cause the area to be very well lit. As can be seen from photographs introduced by the government, the area is desolate country with virtually no inhabitants between the checkpoint and the border.

The Border Patrol attempts to keep this checkpoint operating on a 24-hour basis and in fiscal 1973 they operated around 6,000 hours which is approximately 65 to 70 percent of the time.

At this checkpoint the checking operations are of the usual type with about 75 percent of the vehicles traveling through it being stopped for inquiry with around 10 percent to 15 percent of all vehicles being detained for further inspection. It is estimated that over half of the vehicles at this checkpoint have come directly from Mexicali or have occupants who walked across the border at Calexico.

During the first ten months of calendar year 1973 approximately 690 deportable aliens were apprehended at this checkpoint according to the detailed traffic log maintained by the Border Patrol.

This checkpoint is located on a point with one of the lowest volumes of traffic along Route 86 north of the population centers of Calexico, Brawley and El Centro. From these facts, the district court concluded in part:

The checkpoint on Route 86 is situated at a point with one of the lowest volumes of traffic on that highway, thus tending to cause little intrusion and inconvenience to travelers, as well as scarcely impeding the goal of safe driving. This checkpoint is not easy to intentionally circumvent without being steered into another checkpoint on another highway, in that it is bordered by the Salton Sea on one side and desert on the other. It lies just 36 air miles from the Mexican border and it has been estimated that over half of the vehicles reaching this checkpoint have come directly from Mexicali, B.C., Mexico.

proceed with the delicate constitutional balancing necessary to determine whether the stop and search were unreasonable.

Judges Chambers, Koelsch, Wright, Choy and Sneed concur in this dismissing opinion to Part I.

PART II

WALLACE, Circuit Judge:

The first step in deciding whether a case is to have retroactive effect is to apply a threshold test to determine whether the decision establishes a new rule. If it does, we proceed to test whether the new rule is retroactive. If it does not, no such testing is necessary as, by definition, without a new rule, there is no change in the law and the question of retroactivity is immaterial. For purposes of this case, we hold that to constitute a new rule, the decision must either (1) overrule clear past precedent or (2) disrupt a practice long accepted and widely relied upon.[1]

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[1] This threshold test comes from a footnote in Justice Stewart's dissent in *Milton* v. *Wainwright*, 407 U.S. 371, 381-82 n.2. (1972). Whether this abridged test should be applied in all cases is unclear.

Justice Stewart enunciated a similar test a year earlier in Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971), as follows:

> [T]he decision to be applied nonretroactively must establish a new principal of law, either by overruling clear past precedent on which litigatnts may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . (Citations omitted.)

The fact that *Chevron Oil* was a civil rather than a criminal case should not make any difference. Linkletter v. Walker, 381 U.S. at 627. It is not clear, however, whether the Court will require that one of the Justice Stewart threshold tests always be satisfied before it will apply the *Stovall* test. For example, in Robinson v. Neil, 409 U.S. 505 (1973), the Court declined to apply *Linkletter* (the *Stovall* test) to determine whether Waller v. Florida, 397 U.S. 387 (1970), should be applied retroactively because the issue in question was directed to the fundamental fairness of double jeopardy rather than directed "to collateral purposes such as the deterrence of unlawful police conduct . . . ." 409 U.S. at 509. Although one could argue that *Waller* was a "new" constitutional pronouncement, the Court did not discuss this consideration in deciding not to apply the *Stovall* test.

In Michigan v. Payne, 412 U.S. 47 (1973), the Court was faced with the question of whether North Carolina v. Pearce, 395 U.S. 711 (1969), should be retroactive and applied the *Stovall* test to only part of the *Pearce* rule. The Court stated, without applying the *Stovall* test, that no new constitutional rule was established

Under the first alternative of the test, a decision constitutes a new constitutional rule if it overrules clear past precedent. The test does not require, however, that the Supreme Court reverse itself in order for there to be an overruling of clear past precedent. Such a requirement would not only be illogical but would also be violative of the reason for the rule. Only a small number of the appealed federal cases are ever reviewed by the Supreme Court. As a matter of necessity, the Court must leave the day-to-day application of the law to the lower courts. Therefore, law enforcement procedures must be based to a great extent upon circuit court decisions. Because of this necessity, a law enforcement practice may develop and be sanctioned by court approval for many years before it is reviewed by the Supreme Court. Where such a rule is ultimately reversed by the Court, the pronouncement is "new" simply by

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by requiring that resentencing not be retalitory and, thus, that rule would be available equally to all defendants regardless of the date of their sentencing. However, the Court applied the *Stovall* test to the "prophylactic" limitations established in *Pearce* requiring the judge to give reasons, concluding that they should be applied only prospectively. One could infer from *Payne* that the *Stovall* test should be applied only to "new" rules, but *Robinson* indicates that other factors may also be relevant.

Perhaps the clearest example indicating that the Court may apply a threshold test is Justice Blackmun's opinion in Gosa v. Mayden, 413 U.S. 665 (1973), in which the Court declined to apply the rule announced in O'Callahan v. Parker, 395 U.S. 258 (1969), retroactively. Before applying the *Stovall* test, Justice Blackmun found it necessary to determine whether *Gosa* was an appropriate case to even consider the question of retroactivity. Although noting that the *O'Callahan* case was a "clear break with the past," the primary consideration influencing Justice Blackmun to apply the *Stovall* test was the fact that the convictions under the prior rule were not "so unfair as to void *ab initio*." 413 U.S. at 675. Rather, *O'Callahan* created a prophylactic rule designed to enhance "a newly recognized constitutional principle." 413 U.S. at 675. Even though he noted that the rule was new, Justice Blackmun, like the Court in *Robinson*, appeared to be more concerned with whether the rule affected the integrity of the judicial process than with whether or not it was new.

From these casese, it appears that the Court has not yet formulated a single threshold test to be applied in all cases.

virtue of the fact that the people who apply the law on a day-to-day basis have not previously understood the new statement to be the proper rule. Justice Blackmun recognized this principle, noting specifically that the new pronouncement need not overrule a prior Supreme Court case, when he wrote in *Gosa* v. *Mayden*, 413 U.S. 665, 673 (1973):

> Although the Court in *O'Callahan* did not expressly overrule any prior decision, it did announce a new constitutional principle, and it effected a decisional change in attitude that had prevailed for many decades.

Prior to *Almeida-Sanchez*, there was no indication from any of the courts of appeals that searches at fixed checkpoints were unconstitutional. Rather, the indication was that such searches were constitutional, for 35 of 36 judges who had considered the question in the three circuits involved in enforcing the immigration laws along our Mexican border had upheld immigration stops and searches. *Almeida-Sanchez* v. *United States*, 413 U.S. at 298-99 n.10 (White, J., dissenting).

In addition to the numerous court pronouncements, the statute pursuant to which the Border Patrol acted also constitutes clear past precedent. Since 1952, searches for aliens within a reasonable distance from the border have been authorized by Congress. 8 U.S.C. § 1357(a)(3). Obviously, such a statute establishes a legal rule until repealed or declared unconstitutional. Although the Supreme Court did hold that, under the facts of *Almeida-Sanchez*, that statute cannot make a search conducted by a roving patrol reasonable within the Fourth Amendment, it was the prior law just as much as *Wolf* v. *Colorado*, 338 U.S. 25 (1949), was the prior law until *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The prior law, be it statutory or case law, guides law enforcement personnel and courts until abrogated. Here, the prior law, was in part, statutory and remained unassailed by the Supreme Court or circuit courts for twenty years. It was then limited by *Almeida-Sanchez*. Although it is true that statutes have to be measured by the Constitution,

a legally enacted statute becomes the law until it is vitiated by a court decision. Where the constitutionality of the statute has been repeatedly upheld by the lower courts, it becomes a clear precedent for law enforcement action. Prior statutory law should be treated no differently from prior case law. Thus, *Almeida-Sanchez*, as applied to searches at fixed checkpoints, overrules clear past precedent, both statutory and case law.

Under the second alternative of the threshold test, a decision constitutes a new constitutional rule if it disrupts a practice long accepted and widely relied upon. Here too, *Almeida-Sanchez* measures up as a new pronouncement. For over a decade we have consistently and repeatedly upheld convictions based upon evidence seized during searches made at fixed checkpoints; in none of these cases has the constitutionality of such searches been questioned.[2] A law enforcement practice authorized by our court for such an extensive period easily satisfies the second alternative of the test. Under either alternative, *Almeida-Sanchez* is a new pronouncement.

We, therefore, must determine whether this new rule should be applied retroactively to fixed checkpoints. As the Constitution does not mandate retroactive application, *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965), we must use judicially conceived guidelines to resolve the issue. The tripartite test developed by the Supreme Court in numerous decisions over the last decade was enunciated in *Stovall* v. *Denno*, 388 U.S. 293 (1967), and recently reiterated in *Michigan* v. *Payne*, 412 U.S.

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[2] United States v. Barron, 472 F.2d 1215 (9th Cir.), *cert. denied*, —— U.S. —— (1973); United States v. Campos, 471 F.2d 296 (9th Cir. 1972); United States v. Aranda, 457 F.2d 761 (9th Cir. 1972); Mienke v. United States, 452 F.2d 1076 (9th Cir. 1971); Duprez v. United States, 435 F.2d 1276 (9th Cir. 1970); Fumagalli v. United States, 429 F.2d 1911 (9th Cir. 1970); United States v. Avey, 428 F.2d 1159 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970); Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967); Renteria-Medina, 346 F.2d 853 (9th Cir. 1965); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961); Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960).

47, 51 (1973). The *Stovall* test requires that, before we apply new constitutional protections retroactively, we consider the following three criteria:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. *Denno*, 388 U.S. at 297.

Criterion (a) of the *Stovall* test, the purpose to be served by the new standard, generally dictates that the new pronouncement be applied retroactively only when the pronouncement affects the "fairness of the trial—the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U.S. at 639. Since the legality of the search in no way affects the court's ability to determine whether or not the defendant is actually guilty of committing the crime, a pronouncement requiring the suppression of such evidence serves only as a procedural device to deter future improper police conduct. *See United States* v. *Calandra*, —— U.S. —— (Jan. 8, 1974). Such pronouncements generally should not be applied retroactively. As we held in *Williams* v. *United States*, 418 F.2d 159, 162 (9th Cir. 1969), *aff'd*, 401 U.S. 646 (1971):

> The Court in *Desist* [394 U.S. 244 (1969)] said the foremost of the three criteria was the first. If the purpose is to deter misconduct of police officers in conducting a search, the new exclusionary rule will not be given retrospective effect because that purpose is not advanced by penalizing conduct that has already occurred. The exclusionary rule in such cases, the Court observed, was a procedural device to curb illegal police action and not a rule affecting the integrity of the process for finding the innocence or guilt of an accused.

Criterion (b) of the *Stovall* test, the reliance of law enenforcement officers on the old standards, is similar to the second alternative of our threshold test. A careful analysis

demonstrates that law enforcement personnel justifiedly relied on the prior rule. Since *Almeida-Sanchez* did not determine the constitutionality of searches at a fixed checkpoint, let alone establish a new rule as to such searches, applying *Almeida-Sanchez* to fixed checkpoints would overturn our own Ninth Circuit precedents which stretch back over a decade.

In *Fernandez* v. *United States*, 321 F.2d 283 (9th Cir. 1963), we were specifically faced with the issue of the constitutionality of the statute and regulations authorizing stops and limited searches at a fixed checkpoint. Appellant Fernandez expressly specified as error:

> 1. Regulations sanctioning check points 70 miles within the United States are unconstitutional and illegal per se, and are unconstitutional and illegal as applied in this case.
>
> 2. The stopping of cars 70 miles within the confines of the United States constitutes unconstitutional and illegal search and is unlawful without probable cause.
>
> 3. Evidence discovered during a search following such illegal stopping of a car is "fruit of a poisoned tree", and must be suppressed.

321 F.2d at 285. We found that the statute and regulations, pursuant to which the checkpoints were operated, were "clearly constitutional." After reviewing extensive findings of fact by the district court concerning the necessity of such checkpoints, we concluded that the statute and regulations as applied were "neither arbitrary nor capricious." We further held that after the officers had legally stopped the car, their detection of the odor of marijana constituted probable cause sufficient to justify a search of the car. We have repeatedly reaffirmed *Fernandez*, not only upholding the validity of the initial stopping of the car, but also upholding reasonable searches for aliens made without probable cause. In *Fumagalli* v. *United States*, 429 F.2d 1011 (9th Cir. 1970), after reviewing *Fernandez* and a number of our other earlier cases, we concluded:

> What all of these cases makes clear is that probable cause is not required for an *immigration* search —

> within approved limits but is generally required to sustain the legality of a search for *contraband* in a person's automobile conducted away from the international borders.

429 F.2d at 1013 (footnote omitted). Given the number and the explicitness of our prior pronouncements,[3] it would be hard to find a clearer case justifying reliance on an old standard. Immigration stops and searches at fixed checkpoints, a practice that has extended over a 44 year period, has enjoyed ten years of continued and uninterrupted judicial approval. If the border patrol agents cannot rely upon a statute supported by clear regulations which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval, it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified. *See Adams* v. *Illinois*, 405 U.S. 278, 283-84 (1972); *Johnson* v. *New Jersey*, 384 U.S. 719, 731 (1966).

What was said in *Stovall* v. *Denno*, 388 U.S. 293, 299-300 (1967), is equally applicable here:

> Today's rulings were not foreshadowed in our cases; no court announced such a requirement . . . . Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontation in the absence of counsel.

Criterion (c) of the *Stovall* test requires that we consider the effect the retroactive application of the new pronouncement would have on the administration of justice. The record before us is inadequate to indicate what the effect would be in requiring probable cause or a warrant for all prior stops and searches made at fixed checkpoints. For example, it is impossible to tell how many illegal aliens, as well as alien smugglers and other criminals, were captured red-handed at fixed checkpoints since their inception in 1929. Nonetheless, we are aware that in fiscal year 1973 alone, there were approximately 55,300 deportable aliens apprehended at traffic checkpoints. *United*

[3] See cases cited in note 2, *supra*.

States v. *Baca*, —— F.Supp. ——, —— (S.D. Cal. Jan. 3, 1974). There can be no doubt that a rule requiring the suppression of all evidence obtained by searches made at fixed checkpoints without a warrant or probable cause, applied retroactively, would create immense problems hindering the administration of justice. It is not inconceivable that thousands of convicted criminals might have to be retried or set free.

Nor do we believe, as has been contended, that *Robinson* v. *Neil*, 409 U.S. 505 (1973), should lead us to a different conclusion. There, retroactivity was applied to a non-fact-finding aspect (double jeopardy). But the Court clearly noted that it was creating an exception to the *Linkletter-Stovall* approach similar to that which made the death penalty cases retroactive. The Court explained that prospective application has generally been applied under *Linkletter* when the rule was directed "to collateral purposes such as the deterrence of unlawful police conduct . . . ." *Id.* at 509. They then specifically distinguished rules with collateral purposes from the double jeopardy situation where a defendant could possibly be punished twice for the same crime. The obvious import of *Robinson* in reference to the case before us is that where the purpose of the rule is the deterrence of unlawful police conduct, the rule will be prospective only.

The only remaining question is the date upon which *Almeida-Sanchez* would become applicable to searches at fixed checkpoints. Some would argue that there should be at least a limited retroactivity, requiring us to apply the new rule to those cases involving searches at fixed checkpoints that are now on direct appeal. These are the so-called "pipeline" cases. We reject this approach and hold that *Almeida-Sanchez* applies only to searches at fixed checkpoints after June 21, 1973, the date of the *Almeida-Sanchez* decision. The Supreme Court's recent decisions indicate that the pipeline theory does not enjoy majority approval. *See Stovall* v. *Denno*, 388 U.S. 293 (1967). The Court had precisely that issue before it in *Williams* v. *United States*, 401 U.S. 646 (1971), and a majority declined to apply the new rule either to the cases in the pipeline (on direct appeal) or to the cases that

were before the Court on collateral attack. Only Justices Brennan and Marshall supported the pipeline theory.

In *Michigan* v. *Payne*, 412 U.S. 47 (1973), the Court again adopted limited prospectivity, *i.e.*, only the challenging appellant would benefit from the new rule.[4] In *Payne*, the Court held that the prophylactic limitations established in *North Carolina* v. *Pearce*, 395 U.S. 711, 723-26 (1969), would not be applicable to resentencing proceedings, that occurred prior to the date of the *Pearce* decision, even though Payne's appeal was in the pipeline when *Pearce* was decided. Justice Marshall, dissenting, concluded that "considerations of fairness rooted in the Constitution [require] that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule.' 412 U.S. at 60. None of the other Justices joined in this part of his dissent and Justice Marshall himself admitted that, other than exceptions not applicable in this case, all "constitutional rules of criminal procedure have been given prospective effect only." 412 U.S. at 62 (footnote omitted). He noted that limited retroactivity, as applied in *Linkletter* [381 U.S. at 622], was an "anomaly."[5] It would be unwise for use to adopt

[4] Apparently, the Court has adopted a position of limited prospectivity, rather than pure prospectivity, on the rationale that in order for the Court's pronouncement to avoid being classified as dictum, it must be applied to the parties before the Court. *See*, Stovall v. Denno, 388 U.S. 293, 301 (1967). There has been some criticism of this rationale, [*see, e.g.*, 1B J. Moore, Federal Practice ¶ 0.402 [3.—2-3] (1965)] and the Court has not hesitated to apply a pronouncement with full prospectivity when such a result was appropriate. *E.g.*, England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964); James v. United States, 366 U.S. 213 (1961). *See* Johnson v. New Jersey, 384 U.S. 719, 733 (1966). The primary reason for the Court's adoption of limited prospectivity in cases involving new rules of criminal procedure may be that if the new rule is not applied to the defendant before the Court, defense counsel may lack incentive to proceed with an appeal in the cases where they believe there may be an unconstitutional practice. *See* Stovall v. Denno, 388 U.S. at 301; Note, *Retroactivity Of Criminal Procedure Decisions*, 55 Iowa L Rev. 1309, 1317 (1970).

[5] Justice Marshall stated:

> *Linkletter* v. *Walker*, 381 U.S. 618 (1965), giving a limited retroactive effect to *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is an anomaly at odds with the Court's subsequent treatment of problems of retroactivity and can be explained only by the Court's unfamiliarity with those problems when the case was decided. See also *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

412 U.S. at 61 n.5.

the pipeline theory when the Court has declined to apply it.

Limited prospectively is not a new idea in the line of cases dealing with the retroactivity of new rules of criminal procedure. In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), decided only one year after *Linkletter*, the Court held that *Escobedo* and *Miranda* would apply only to cases in which the trial began after the dates of the decisions. One could argue that *Johnson* does not really deal with the pipeline theory because the case was before the Court on collateral attack. But such an argument would ignore the fact that the Court expressly announced that:

> [W]e do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal.

384 U.S. at 733. Limited prospectivity, as the Court discussed it in *Johnson*, is particularly suited for application in this case. A majority of our court has agreed that *Almeida-Sanchez* as applied to fixed checkpoints enunciates a new rule of criminal procedure. The sole purpose for the new rule is to deter *future* police misconduct. *United States* v. *Calandra*, —— U.S. —— (Jan. 8, 1974). Given this conclusion, the new rule can reasonably be applied only to convictions based upon searches conducted after the date of the *Almeida-Sanchez* decision. Freeing Bowen from his conviction will not deter *future* police misconduct.

If the new constitutional rule is designed to correct a defect that involves the court's ability to determine whether a defendant is guilty or not, it obviously has to be fully retroactive. But here, the new rule has no such effect. Bowen, like Almeida-Sanchez, is a convicted felon —caught red-handed. The question is not whether they violated the law, but rather whether they should be freed because the police detected their violations through un-

constitutional procedures. We are applying the *Almeida-Sanchez* rule to searches conducted at fixed checkpoints only to deter these unconstitutional procedures in the future. Our reason for applying the rule demonstrates that it should be applied prospectively only. Almeida-Sanchez receives the benefit of the new rule because of the Court's apparent belief that to do otherwise would put the Court in the position of providing advisory opinions.[6] That policy is not enhanced or furthered by applying the rule to other cases on appeal. There is no compelling reason which requires that we overturn many convictions merely because the Supreme Court mandates that one must be overturned.

We conclude that any application of *Almeida-Sanchez* to fixed checkpoints would be a new rule and under the *Stovall* test, it would have to be applied prospectively to searches subsequent to June 21, 1973. Therefore, *Almeida-Sanchez* can be of no assistance to Bowen.

AFFIRMED.

Judges Chambers, Koelsch, Wright, Trask, Choy and Sneed concur in this majority opinion (Part II).

[Part II]

GOODWIN, Circuit Judge, concurring and dissenting:

Believing that the legal history of roving patrols is fundamentally different from the legal history of fixed-checkpoint searches, I concur in that part of Judge Wallace's opinion in Part II which limits the holding of Part I to searches conducted after June 23, 1973. While a roving-patrol search, supported by neither warrant nor probable cause, was not upheld by this circuit until 1970 (*United States* v. *Miranda*, 426 F.2d 283 (9th Cir. 1970), a mere two years before certiorari was granted in *Almeida-Sanchez* (406 U.S. 944 (1972)), fixed-checkpoint searches enjoyed judicial approval at least since 1963 (*Fernandez* v. *United States*, 321 F.2d 283 (9th Cir. 1963)) and apparent statutory authorization since 1946

[6]See note 4, *supra*.

(Act of Aug. 7, 1946, ch. 768, 60 Stat. 865.) Our rejection of fixed-checkpoint searches therefore "marks a sharp break in the web of the law," *Milton* v. *Wainwright*, 407 U.S. 371, 38182 n.2 (1971) (dissenting opinion of Stewart, J.), sufficient to deny retroactive application.

My concurrence is qualified, however, by the belief that Bowen himself should be entitled to the fruits of his appeal. He fully preserved his objections to the search of his camper-truck by the border patrol. He took his case all the way to the Supreme Court, which reversed his conviction and remanded the case for reconsideration in light of *Almeida-Sanchez*. Now, we tell Bowen that he was right, that searches at fixed checkpoints, supported by neither a warrant nor probable cause, are unconstitutional. Yet, we also tell him that because of a judically created rule of nonretroactivity, he cannot take advantage of a ruling which he has fought for two years to obtain. However, regardless of the nonretroactivity of our newly announced rule on fixed checkpoints, as the moving party in the case in which this new rule has been announced, Bowen is fully entitled to its protection. To prevent having our determination in Part I stand as mere dictum, as well as to comply with the "case or controversy" requirement of Article III of the Constitution, we must allow Bowen to benefit from our constitutional determination. *See Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). *See also Desist* v. *United States*, 394 U.S. 244, 254-55 n.24 (1969).

Judges Merrill, Browning and Duniway concur in this concurring and dissenting opinion.

HUFSTEDLER, Circuit Judge, with whom Judge Ely concurs, concurring in part I and dissenting from part II, of the opinion of the Court:

I cannot concur in the opinions confining the *Almeida-Sanchez* rule to searches occurring after June 21, 1973, with or without an exception for Bowen himself, when the locale of the search was a fixed checkpoint that was not the functional equivalent of an international border.

My brothers and I agree that no retroactivity issue arises unless *Almeida-Sanchez* stated a new rule marking

"a sharp break in the web of the law." [1] We are also in agreement that *Almeida-Sanchez* announced no new Supreme Court rule and that it signaled no break at all in the constitutional principles stated by the Court.[2] Injection of the retroactivity issue in the opinions of my brothers Wallace and Goodwin rests on two assumptions: (1) Congress, the Ninth Circuit, and the Immigration and Naturalization Service, prior to *Almeida-Sanchez*, had long agreed that automobile searches conducted by personnel of the Service at fixed checkpoints that were not functional equivalents of international boundaries should be treated as if they were such "border searches," thus eliminating the Fourth Amendment's requirements of a warrant and probable cause, and (2) for retroactivity purposes, the weavers of the constitutional law web are not limited to the members of the Supreme Court, but also include Congress, the lower federal courts, and the personnel of the Immigration and Naturalization Service. The first assumption is inaccurate as a matter of fact; the second is wrong as a matter of law.

My brothers correctly state that the Immigration and Naturalization Service began establishing fixed checkpoints some distance from international boundaries in 1929. The information before us about those checkpoints

[1] The phrase is taken from Mr. Justice Stewart's dissenting opinion in Milton v. Wainwright (1972) 407 U.S. 371, 381-82 n.2. *See* Desist v. United States (1969) 394 U.S. 244, 248 ("clear break with the past").

[2] "No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile." (Almeida-Sanchez v. United States (1973) 413 U.S. 266, 269.)

The Court has recognized, however, at least since Carroll v. United States (1925) 267 U.S. 132, that automobile travellers could be stopped and their vehicles searched "in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." (*Id.* at 154.) But nothing in *Carroll*, or in any other Supreme Court decision even implies that, for Fourth Amendment purposes, the Government could create portable boundaries or affix artificial borders wherever it chose.

is fragmentary. We do not know how many there were, where they were located, or which, if any of them, qualified as functionally equivalent to international boundaries. We also lack information about the kinds of searches, if any, that were conducted at them. However, we do know that any vehicle searches that were undertaken at points other than international boundaries were without color of statutory authority until 1946 when Congress enacted the precursor of 8 U.S.C. § 1357. (*See* Act of Aug. 7, 1946, ch. 768, 60 Stat. 865.)[3] Although Congress thus

[3] Congressional objectives in enacting the statute were stated in a letter from Attorney General Francis Biddle to the Chairman of the House Committee on Immigration and Naturalization that was incorporated in the Committee's Report and adopted by its Chairman as "quite completely" explaining the purposes of the bill. The letter clearly indicated that the Attorney General and the Committee believed that the Immigration and Naturalization Service lacked statutory authority to conduct searches away from the boundaries of the United States:

"HON. SAMUEL DICKSTEIN,

Chairman, Committee on Immigration and Naturalization, House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN. This is in response to your request for my views relative to a bill (H.R. 386) to amend the law relating to the authority of certain employees of the Immigration and Naturalization Service to make arrests without warrant in certain cases and to search vehicles.

Under existing law arrests of aliens may be made without warrant only if the alien is entering or attempting to enter the United States in the presence or view of the arresting officer (43 Stat. 1049; 8 U.S.C. 110). Aliens illegally in the United States may be arrested only pursuant to a warrant issued by the Immigration and Naturalization Service. This limitation is cumbersome and at times results in frustrating the ends of justice. The power to make arrests in such cases without a warrant should be conferred on personnel of the Immigration and Naturalization Service with a restriction that an alien so taken into custody should be accorded a hearing without unnecessary delay.

It is also desirable to confer upon personnel of the Immigration and Naturalization Service the power of arrest in cases of violations of immigration laws, subject to the same limitations as those generally imposed on the right of an officer to make an arrest.

Existing law (43 Stat. 1049; 8 U.S.C. 110) confers on personnel of the Service the right to search vessels and vehicles for aliens being brought into the United States. This authority should be

eventually authorized checkpoint searches by Immigration and Naturalization personnel, congressional attention never focused on the constitutional difficulties engendered by the movable border concept that was included in section 1357. (*See, e.g.*, H.R. Rep. No. 186, 79th Cong., 2d Sess., *supra* note 3.)

Fourth Amendment challenges to "alien" searches conducted by immigration and customs officials at places other than international boundaries were raised in the lower federal courts The judicial response, however, did not rest on a comprehensive, critical analysis of the differences between searches at international boundaries and those conducted some distance from the border;[4] rather, the law concerning check point and roving patrol searches

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extended to cover aircraft, in the light of recent developments in aircraft transportation.

In the enforcement of the immigration laws it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and the legal right to do so should be conferred by law.

The bill under consideration embodies the foregoing suggestions and is similar to a bill (H.R. 5464, 78th Cong.) which was introduced at my request and was passed by the House of Representatives on December 4, 1944.

Accordingly, I recommend the enactment of the legislation.

I have been informed by the Director of the Bureau of the Budget that there is no objection to the submission of this report.

Sincerely yours,

FRANCIS BIDDLE,
Attorney General."

H.R. Rep. No. 186, 79th Cong., 2d Sess. (1945), 1946 U.S. Code Cong. Service 1414.

[4] When customs officers at a distance from the border conducted warrantless searches for narcotics, rather than for aliens, our circuit refused to uphold the searches in the absence of probable cause. (*E.g.*, Contreras v. United States (9th Cir. 1961) 291 F.2d 63.) The Government's argument that 26 U.S.C. § 7607 eliminated the traditional probable cause requirement was rejected as contrary to the Fourth Amendment. (*e.g.*, Plazola v. United States (9th Cir. 1961) 291 F.2d 56, 58-59.) These cases, of course, cannot be reconciled on constitutional grounds with the alien search cases commencing with Fernandez v. United States (9th Cir. 1963) 321 F.2d 283.

developed on a case-by-case basis, following the practice so familiar in other Fourth Amendment contexts. The end product of the evolution in this circuit was that section 1357 became a justification for the initial stop of a vehicle and the preliminary interrogation of the occupants at either a fixed checkpoint or elsewhere within a reasonable distance of the border; but probable cause was still required to validate a warrantless search of the vehicle, at least if the search went beyond that reasonably related to the discovery of aliens.[5] Although these "alien" non-international boundary vehicle search cases were sometimes labeled "border searches," they were always a breed apart from searches actually conducted at international boundaries. The latter were treated as they always had been: no warrant and no probable cause

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[5] We considered numerous cases involving alien searches conducted a substantial distance from an international border. A few, however, are illustrative of the development of the law in our circuit. In Fernandez v. United States (9th Cir. 1963) 321 F.2d 283, appellant was stopped at a fixed checkpoint by customs inspectors looking for aliens. Probable cause to believe marihuana was concealed in the vehicle developed during the stop. The constitutionality of 8 U.S.C. § 1357 was upheld, and the statute was applied to justify the initial stop of appellant's vehicle. Barba-Reyes v. United States (9th Cir. 1967) 387 F.2d 91 involved a stop and search similar to that in *Fernandez*. Again, the stop was justified under section 1357, and probable cause to search was found to exist following the stop. In United States v. Marin (9th Cir. 1971) 444 F.2d 86, a roving patrol stopped appellant's vehicle three miles from the border, The stop was upheld under section 1357; marihuana was discovered in plain view. The search at a fixed checkpoint in Valenzuela-Garcia v. United States (9th Cir. 1970) 425 F.2d 1170 was invalidated, however, because the search extended to an area too small to hide aliens and there was no probable cause to believe that contraband was hidden in the vehicle. *Accord*, United States v. Lujan-Romero (9th Cir. 1972) 469 F.2d 683.

The development of "alien" searches followed a similar pattern in the Tenth Circuit. (*e.g.*, United States v. Anderson (10th Cir. 1972) 468 F.2d 1280; United States v. McCormick (10th Cir. 1972) 468 F.2d 68; *see* Roa-Rodriquez v. United States (10th Cir. 1969) 410 F.2d 1206.) But the Fifth Circuit created an expandible border concept that had only tangential relationship to the law emerging from the Ninth and Tenth Circuits. (*E.g.*, United States v. McDaniel (5th Cir. 1972) 463 F.2d 129; Marsh v. United States (5th Cir. 1965) 344 F.2d 317).

were required to validate a thorough, full-scale search of the vehicle and its contents. The validity of warrantless, non-boundary "border searches" conducted without probable cause, on the other hand, was limited both in scope and in object.

Of perhaps greater moment for our retroactivity analysis, an examination of Ninth Circuit cases reveals that fixed checkpoint searches fared neither better nor worse than searches conducted at temporary checkpoints or by roving patrols away from the border. In all of these cases we approved initial stops pursuant to section 1357 and limited the scope of subsequent search activity. (*See* note 5 *supra.*) The assumption of my brothers that full-scale international boundary-type vehicle searches conducted at fixed checkpoints located away from the border had received long-continued judicial approval is not supported by the facts; my brothers' conclusion that *Almeida-Sanchez* sharply broke with prior law from the lower federal courts concerning fixed checkpoint searches cannot be sustained.

Even if the Ninth Circuit for many years had consistently upheld these alien searches at fixed checkpoints, however, that fact would not be pertinent to deciding whether retroactivity is in issue.[6] For this purpose, the only "old" and "new" law that is relevant is the constitutional law enunciated by the Supreme Court. (*See Robinson* v. *Neil* (1973) 409 U.S. 505, 510.) A contrary rule would impair or destroy the uniform application of constitutional law in the several circuits, increase manifold the certiorari burdens of the Supreme Court, and erode the power of the Supreme Court as the ultimate arbiter of constitutional law.

These disturbing consequences might not occur if all circuits simultaneously decided constitutional questions and always decided them the same way. But they do not. The question of the constitutionality of fixed checkpoint

[6] I fully recognize that if the retroactivity doctrine were properly in issue, lower court decisions and law enforcement officers' reliance upon them would be relevant considerations in deciding whether to apply a particular Supreme Court decision retroactively. (*E.g.*, Stovall v. Denno (1967) 388 U.S. 293.)

searches at issue in the case at bench provides an excellent illustration of the problems that can arise under my brothers' views. The issue arose at different times with different frequency in some circuits and in others did not arise at all. In the circuits where the issue was never decided, did *Almeida-Sanchez* state a "new" rule? Is a single decision in one circuit upholding the search enough to create "old" law with which *Almeida-Sanchez* broke? If one circuit had upheld such searches and another had struck them down, would *Almeida-Sanchez* be retroactive in the latter circuit and nonretroactive in the former?[7] To prevent restrictions on the retroactivity of its decisions, must the Supreme Court take every new search and seizure issue to prevent "old" law from accumulating? If the Court is in any respect bound by the constitutional law developed in the lower federal courts, how can it continue to be the final arbiter of constitutional issues?[8]

Even when the retroactivity concept is confined exclusively to law stated by the Supreme Court, difficult jurisprudential problems are generated. (*See, e.g., Desist* v. *United States* (1969) 394 U.S. 244, 256-69 (Harlan, J.,

[7] Even a clarifying Supreme Court decision would not necessarily prevent retroactivity problems from arising. For example, in light of *Almeida-Sanchez*, the Fifth Circuit has invalidated a search conducted at a checkpoint located 65 to 75 miles north of the Mexican border. (United States v. Speed, 5th Cir. 1973) 489 F.2d 478.) If the views expressed in my brother Wallace's dissenting opinion concerning the applicability of *Almeida-Sanchez* to fixed checkpoints had gained the adherence of a majority of our court, would a subsequent decision by the Supreme Court affirming the Fifth Circuit decision create new law for the Ninth Circuit, while merely confirming old law in the Fifth?

[8] The difficulties created by the view that circuit decisions can establish "old" law are multiplied greatly if unappealed district court decisions also produce old law. Yet the rationale of my brothers' opinion is not in any way limitable to circuit decisions. Moreover, deciding issues of federal constitutional law is not solely the prerogative of federal courts. Can the judiciaries of 50 states also create old law from which the Supreme Court departs when it reaffirms established constitutional principles and refuses to countenance a deviation sanctioned by the decisions of one or more state courts?

dissenting). To extend the concept to embrace the law of the circuits would turn confusion into chaos.

CHAMBERS, Circuit Judge, concurring and dissenting:

I concur and dissent as indicated above.

I adhere to my original position that these Almeida-Sanchez cases should not have been taken en banc. See United States v. Bowen, —— F.2d ——.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6848

JOHN LEE BOWEN, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed here *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted; and the case is set for oral argument in tandem with No. 73-2050 and No. 74-114.

October 15, 1974

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No. 73-1048

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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SUPREME COURT, U.S.

JOHN LEE BOEHM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-6048

JOHN LEE BOWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of having smuggled marijuana into the United States from Mexico (count 1), having concealed and facilitated the transportation of marijuana knowing it to have been illegally imported (count 2), and having illegally possessed depressant and stimulant drugs (count 3), in violation of 21 U.S.C. (1964 ed.) 176(a) and 331(q)(3)(B). He was sentenced to concurrent terms of seven years' imprisonment on counts 1 and 2 and to five years' probation on count 3.

On June 15, 1972, the court of appeals affirmed per curiam (437 F.2d 347). This Court thereafter granted a petition for a writ of certiorari (413 U.S. 915), vacated the judgment of the court of appeals, and remanded the case for further consideration in light of Almeida-Sanchez v. United States, 413 U.S. 266. On remand, the court of appeals again affirmed petitioner's conviction (Pet. App. A).

1. The essential facts are set forth in the opinion of the court of appeals (Pet. App. A, p. 1). While traveling north on California State Highway 86 in his camper truck, petitioner was stopped at a permanent Border Patrol immigration checkpoint located on Highway 86 approximately 36 air miles and 49 highway miles north of the Mexican border. During a routine search of the camper truck for illegal aliens, Border Patrol officers discovered marijuana and depressant and stimulant drugs in the vehicle. Petitioner's pre-trial motion to suppress the evidence resulting from this search was denied by the district court.

Following conviction, petitioner argued on appeal that the search of his vehicle and the seizure of the marijuana were unlawful. The court of appeals, however, summarily rejected the claim, stating that "[t]he search and seizure were plainly lawful" (437 F.2d at 348). The petition for a writ of certiorari to review that judgment of affirmance was held by this Court pending its decision in Almeida-Sanchez v. United States, supra, in which the Court ruled that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained any aliens present in this country unlawfully, violated the Fourth Amendment's prohibition against unreasonable searches and seizures, and that the evidence seized as a result of the search must be excluded at trial.

On remand, the court of appeals, sitting en banc, again affirmed petitioner's conviction, setting forth its

reasons in a lengthy two-part opinion. In Part I, the court held by a 7-6 vote (1) that, since "Almeida-Sanchez is as applicable to fixed-checkpoint searches as to roving-patrol searches" (Pet. App. A, Part I, p. 10), evidence seized in a warrantless, non-probable-cause, checkpoint search of an automobile for aliens must be suppressed under the principles of Almeida-Sanchez unless it can be said to be the "functional equivalent" of a border search; and (2) that "the search is a functional equivalent of a border search" only if it "takes place at a location where virtually everyone searched has just come from the other side of the border" or if it can be said with "reasonable certainty" either that the contents of the vehicle were aboard when the vehicle crossed the border or, if the vehicle has not itself crossed the border, that the persons or things in it recently entered or were brought into this country illegally (id. at 6-8).

In Part II, the court held that the principles of Almeida-Sanchez, as applied to searches at fixed checkpoints, created a new constitutional rule that should not be applied retroactively to searches that occurred prior to June 21, 1973, the date of this Court's decision.[1/] Since the search in the present case occurred prior to June 21, 1973, the court held

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1/ On the same day, the court of appeals held 7-6 in United States v. Peltier, C.A. 9, No. 73-2509, that, as applied to roving patrol searches, Almeida-Sanchez did not create a new constitutional rule and that the principles of that decision "should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced" (slip op. 1). We have filed a petition for a writ of certiorari to review the court of appeals' judgment in Peltier (No. 73-2000).

that petitioner's motion to suppress was correctly denied.[2/]

2. Petitioner gives three reasons in support of his contention that he should be given the benefit of the new rule established by the court of appeals in this case. First, he contends that Almeida-Sanchez should be applied retroactively in all cases, because that decision did not overrule any prior decision of this Court (Pet. 11-13). Second, he argues that, to avoid "grave injustice" (Pet. 9), Almeida-Sanchez should be applied retroactively at least "to cases pending on direct review at the time the decision was rendered" (ibid.) and in which the appellant had properly preserved the issue (Pet. 7-10).[3/] Third, he contends that the new rule announced by the court of appeals in the present case -- that Almeida-Sanchez extends to fixed checkpoint searches -- must be applied to petitioner in order "to meet the case or controversy requirement of Article III" and to assure that "the decision outlawing these checkpoint searches" amounts to more than "mere dictum" (Pet. 10).

2/ The majority opinion in Part II represented the views of seven judges. Four other judges concurred in the holding that the new rule should apply only to searches conducted after the date of the decision in Almeida-Sanchez, but they would have ruled that petitioner himself, "as the moving party in the case in which this new rule has been announced * * * is fully entitled to its protection" (Pet. App. A, Part II, opinion of Judge Goodwin, p. 2). Two judges dissented on the ground that Almeida-Sanchez created no new rule for retroactivity purposes (Pet. App. A, Part II, opinion of Judge Hufstedler).

3/ As petitioner correctly points out (Pet. 7), the Tenth Circuit has so held in United States v. King, 485 F.2d 353, and United States v. Maddox, 485 F.2d 361. Those decisions, which also involved checkpoint searches, thus conflict with the decision of the court of appeals in the present case.
(footnote cont'd)

There is, in our view, a threshold question: whether the court of appeals correctly concluded that the principles of Almeida-Sanchez require the suppression of evidence seized in a warrantless checkpoint search. If that part of the decision was incorrect -- that is, if prior judicial approval is not essential to the conduct of limited searches of automobiles for aliens at fixed checkpoints -- then there is no need to consider petitioner's retroactivity argument, which necessarily presupposes that Almeida-Sanchez applies to checkpoints. In those circumstances, the court of appeals' judgment of affirmance would be correct for reasons other than those stated in its opinion.

The issue whether Almeida-Sanchez applies to checkpoint searches is before this Court in the government's petition for a writ of certiorari in United States v. Ortiz, No. 73-2050. In that case, the Ninth Circuit held, on the authority of its decision in the present case, that evidence seized in a checkpoint search conducted after the decision in Almeida-Sanchez must be suppressed.

We believe that it would be appropriate to defer disposition of the present petition pending action on the petition in Ortiz. If the Court denies the petition in Ortiz,

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3/ (footnote cont'd)

The Fifth Circuit has not clearly decided whether Almeida-Sanchez requires warrants for checkpoint searches, but it has held, in agreement with the Ninth Circuit, that any pre-Almeida-Sanchez searches would, in any event, be unaffected. United States v. Nocla, 493 F.2d 910; United States v. Cook, 492 F.2d 744; United States v. Hufstetler, C.A. 5, No. 73-2927, decided July 3, 1974.

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the present case would be an alternative vehicle for review of the first question presented in that petition -- whether Almeida-Sanchez applies to checkpoint searches. If the Court grants the petition in Ortiz and agrees with our contention that warrants are not required for checkpoint searches, then the judgment in the present case would be correct, albeit for reasons other than those relied on by the court of appeals, and the present petition should be denied after Ortiz is decided.

If the Court grants the petition in Ortiz but disagrees with our contention on the checkpoint issue, then it would reach the second issue presented in that petition -- whether the decision of the court of appeals in the present case constitutes a new rule which should be applied in the Ninth Circuit only to checkpoint searches that occurred after the date of the decision in this case. The Court's resolution of that issue in Ortiz may affect the proper disposition of petitioner's retroactivity contentions in the present case. If, for example, the Court agrees with our position in Ortiz that the court of appeals' ruling in the present case announced a "new rule" for retroactivity purposes, then there may be merit to petitioner's claim that he should benefit from that new rule as the litigant whose case served as the vehicle for the Ninth Circuit's extension of Almeida-Sanchez to checkpoint searches. See Stovall v. Denno, 388 U.S. 293. In that event, it might be appropriate to grant the present petition and remand the case for further consideration in light of this Court's decision in Ortiz.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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No. 73-6848

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

JOHN LEE BOWEN, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-6848

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In our initial response to the petition for a writ of certiorari in this case we suggested that the petition be held pending action on our petition in United States v. Ortiz, No. 73-2050. We reasoned that, if the Court grants the petition in Ortiz and agrees with our contention that warrants are not required for checkpoint searches, then there would be no need to reach petitioner's retroactivity contentions. If, on the other hand, the Court disagrees with our argument on the checkpoint issue and therefore reaches our second contention in Ortiz -- that the exclusionary rule should not be applied in the Ninth Circuit with respect to warrantless checkpoint searches conducted before that court's decision in the present case -- then this Court's opinion in Ortiz might affect the proper disposition of petitioner's contentions in this case.

Upon further reflection, we have concluded that it might be preferable to grant certiorari in the present case as well as in Ortiz in order to ensure a determination this Term of all the unresolved issues concerning checkpoint searches. If the Court should determine, contrary to our contentions in Ortiz, that warrants are required for checkpoint searches and that the exclusionary rule should apply with respect to the post-Almeida-Sanchez (but pre-Bowen) search involved in Ortiz, petitioner's contention in the present case that the rule's retroactivity should extend as well to the pre-Almeida-Sanchez search involved here would remain unresolved.

It is important to the administration of justice that these retroactivity issues be fully resolved as expeditiously as possible. There are several pending petitions for writs of certiorari in cases, like the present one, involving pre-Almeida-Sanchez checkpoint searches. There are also numerous petitions for rehearing pending in the Ninth Circuit in cases, like Ortiz, involving post-Almeida-Sanchez but pre-Bowen checkpoint searches. 1/

Although a decision by this Court in United States v. Peltier, No. 73-2000 -- which involves the applicability of the exclusionary rule with respect to pre-Almeida-Sanchez "roving patrol" searches -- might also bear on the proper treatment of pre-Almeida-Sanchez "checkpoint" searches, granting certiorari in the present case together with Ortiz would ensure that no new round of retroactivity litigation would be necessary next

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1/ In order to avoid cluttering this Court's docket with duplicative petitions for writs of certiorari in cases involving such searches, the government has followed the practice in the Ninth Ciruit of filing petitions for rehearing in the court of appeals with the suggestion that the petition be held pending this Court's action in Ortiz. In some cases, the government has asked the court of appeals simply to stay the issuance of its mandate in such cases.

Term in checkpoint cases and would unambiguously dispose of all pending cases involving those issues. 2/

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

2/ Since the issues in the present case and Ortiz are closely related, it may not be necessary to assign a full hour of argument time to each case.

Supreme Court, U. S.
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IN THE

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JOHN LEE BOWEN,

Petitioner,

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Respondent.

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BRIEF FOR PETITIONER

MICHAEL D. NASATIR, of
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 653-3303

JERALD W. NEWTON, of
Newton, Re & Russell
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 655-5011

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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OCTOBER TERM, 1974

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JOHN LEE BOWEN,

Petitioner,

v.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

To Petitioner's knowledge there are no official or unofficial reports of the Order of the District Court denying John Lee Bowen's Motion to Suppress Evidence. The original opinion of the United States Court of Appeals for the Ninth Circuit affirming the instant search and seizure and Mr. Bowen's conviction is *United States v. Bowen*, 462 F.2d 347 (9th Cir. 1972). The first opinion of this Court granting certiorari,

granting leave to proceed in forma pauperis and remanding to the Ninth Circuit in light of *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2533 (1973), is reported as *Bowen v. United States*, 413 U.S. 915, 93 S.Ct. 3069 (1973). The en banc decision of the United States Court of Appeals for the Ninth Circuit, on remand is reported as *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974).

JURISDICTION

On May 9, 1974, the United States Court of Appeals for the Ninth Circuit, held that fixed checkpoint searches, away from the international border, not located at the functional equivalent of a border, without warrant or probable cause, violated the Fourth Amendment to the United States Constitution. However, the Court of Appeals further held that John Lee Bowen was not entitled to the benefits of said "new" ruling and that said ruling was made retroactive only until June 21, 1973, the date of this Court's ruling on *Almeida-Sanchez, supra. United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974).

A timely petition for writ of certiorari in the instant cause was lodged with this Court on June 7, 1974.

The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS

1. United States Constitution, Article III.
2. The Fourth Amendment to the United States Constitution.
3. The Fifth Amendment to the United States Constitution.
4. Title 8, U.S.C. § 1357.
5. Title 8, C.F.R. § 287.1(a) (2).

The foregoing have been set forth in the Appendix attached hereto.

QUESTIONS PRESENTED

Whether the constitutional principles requiring probable cause and warrants for searches reaffirmed in *Almeida-Sanchez, supra,* and in *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), Part I, involving "immigration searches" far removed from the international boundaries should be applied to John Lee Bowen who has challenged the validity of the instant seizure at all applicable judicial proceedings, and whose cause was pending before this Honorable Court on the date that *Almeida-Sanchez* was decided. Specifically:

1. Whether the United States Court of Appeals for the Ninth Circuit can refuse to apply the probable cause and warrant requirements for immigration searches far removed from the international boundaries of the United States articulated in *Almeida-Sanchez, supra*, to Petitioner, when *Almeida-Sanchez* did not

make "new law;" was itself based on fundamental Fourth Amendment law as enunciated in the "car search cases" and "administrative search cases;" and did not overrule any previous determination of the United States Supreme Court?

2. Whether the decision in Part I of *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), which held as "new law" the principle that fixed checkpoint searches away from the international boundaries of the United States must be conducted with probable cause and a warrant, must be applied to the litigant himself, John Lee Bowen, so that the opinion of the Court is not "mere dictum" and the "case or controversy" requirement of Article III, Section 2 of the United States Constitution would be followed?

3. Whether John Lee Bowen should be entitled to the fruits of his appeal from the United States District Court for the Central District of California, to the United States Court of Appeals for the Ninth Circuit, to the United States Supreme Court, back again to the United States Court of Appeals for the Ninth Circuit and back to the United States Supreme Court, when Mr. Bowen's matter was on "direct" appeal at the time of *Almeida-Sanchez, supra*, and where the result reached in *Almeida-Sanchez* was foreshadowed by previous Supreme Court decisions?

STATEMENT OF THE CASE

1. Petitioner was arrested on January 19, 1971, and a three count Indictment was returned against him on January 27, 1971, charging him with violations of Title 21, U.S.C. § 176(a) and 331(g)(3)(b).

2. On August 23, 1971, Petitioner's Motion to Suppress Evidence in connection with the instant cause was denied. On August 27, 1971, John Lee Bowen's jury trial commenced and on August 31, 1971, Mr. Bowen was found guilty as charged on all three counts on the Indictment. On October 7, 1973, Bowen was sentenced to seven years imprisonment. A timely Notice of Appeal was filed with the Ninth Circuit.

3. On June 16, 1972, the United States Court of Appeals for the Ninth Circuit affirmed Mr. Bowen's conviction in *United States v. Bowen*, 462 F.2d 347 (9th Cir. 1972); Bowen's Petition for Rehearing en banc was denied by said Court on July 24, 1972. A Petition for Writ of Certiorari and request for leave to proceed in forma pauperis were prepared and lodged with this Court on August 28, 1972.

4. On June 25, 1973, this Court granted Petitioner leave to proceed in forma pauperis, vacated the previous opinion of the United States Court of Appeals for the Ninth Circuit and remanded the cause back to the Ninth Circuit for further consideration in light of *Almeida-Sanchez, supra,* in *Bowen v. United States,* 413 U.S. 915, 93 S.Ct. 3069 (1973).

5. On October 23, 1973, the United States Court of Appeals for the Ninth Circuit voted to hold an en banc hearing on Petitioner's cause. On May 9, 1974, said Court held that fixed checkpoint searches away from the border, not located at the functional equivalent of a border, without warrant or probable cause, violated the Fourth Amendment to the United States Constitution. However, the Court of Appeals further held Petitioner was not entitled to the benefits of said "new" ruling as said ruling was made retroactive only until June 21,

1973, the date of this Court's ruling on *Almeida-Sanchez, supra. United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974).

6. A timely petition for writ of certiorari in the instant case, *Bowen v. United States*, was lodged with this Honorable Court on June 7, 1974.

7. On October 15, 1974, this Court granted Petitioner's Petition for writ of certiorari and leave to proceed in forma pauperis in the above-entitled cause.

ARGUMENT

I.

JOHN LEE BOWEN IS ENTITLED TO RELIEF PURSUANT TO THIS COURT'S DECISION IN *ALMEIDA-SANCHEZ, SUPRA*, SINCE THAT CASE PRESENTS NO CHOICE BETWEEN PROSPECTIVE OR RETROACTIVE APPLICATION OF NEW CONSTITUTIONAL PRINCIPLES OR INTERPRETATIONS; INSTEAD, IT MERELY REAFFIRMS THE WELL ESTABLISHED SUPREME COURT "CAR SEARCH CASES" AND "ADMINISTRATIVE SEARCH CASES."

In the proceedings in the United States Court of Appeals for the Ninth Circuit, on remand, that Court held in Part I of the decision that the warrantless search of Mr. Bowen's camper, conducted without probable cause, at a checkpoint over fifty miles from the international boundaries of the United States violated the Fourth Amendment. However, in Part II of the decision the Court further held that this holding established "new" law and therefore Mr. Bowen was not entitled to the benefits of said decision. In reaching this decision, the

divided Court held that to constitute a new rule a decision must:

> "(1) Overrule clear past precedent or (2) Disrupt a practice long accepted and widely relied upon.[1]" (Footnote omitted) 500 F.2d at 975.

The Court then found that fixed checkpoint searches had become established precedent under Title 8 U.S.C. § 1357(a) and that the Ninth Circuit had continually upheld convictions based upon evidence seized during searches made at fixed checkpoints. *United States v. Bowen*, 500 F.2d 960, 977, n.2 (9th Cir. 1974) The Ninth Circuit did not, and could not, cite any authority from this Court upholding the aforementioned statute or the result reached in the aforementioned cases. This reliance on lower Courts' decisions to determine whether "new law" is made, as opposed to decisions of this Honorable Court, would seem to be misplaced. See *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 879 (1973).[1]

In fact, the previous decisions of this Court have clearly indicated in analogous situations that searches such as the one directed against Mr. Bowen and his vehicle without probable cause or warrant were unconstitutional. As was stated in *Almeida-Sanchez, supra*:

> No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile." 93 S.Ct. at 2537.

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[1] An excellent opinion pointing out the chaotic effect of reliance on lower court decisions to determine whether a decision constitutes "new law" can be found in the dissenting opinion of Judge Hufstedler in *United States v. Bowen*, 500 F.2d 960, 985 (9th Cir., 1974).

The Court continued to state:

> "In seeking a rationale for the validity of the search in this case, the Government thus understandably sidesteps the automobile search cases. Instead, the Government relies heavily on cases dealing with administrative inspections. But these cases fail to support the constitutionality of this search." 93 S.Ct. at 2538

Indeed, ever since *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (1914), the exclusionary rule has been applied in federal cases to prohibit the introduction of evidence seized without probable cause and without warrant unless there were exigent circumstances. This Court has *never* allowed the fruits of a search not based upon probable cause into evidence.

In arriving at the decision in *Almeida-Sanchez, supra*, this Court merely followed the doctrine first enunciated by Mr. Chief Justice Taft in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925). *Carroll, supra*, merely dispensed with the warrant requirement for searching automobiles under certain limited circumstances while specifically reaffirming the constitutional necessity that all searches be based upon probable cause.

Carroll was followed by *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240 (1931), where Mr. Justice Stone (later Chief Justice), said:

> "The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, *if the search is upon probable cause.*" 51 S.Ct. at 241.

In *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949), the Court sustained the warrantless search

of an automobile by federal officers upon the ground that:

> "Each of the ultimate facts found in *Carroll* to constitute probable cause, when taken together, is present in this case and is fully substantiated by the proof. Accordingly, the *Carroll* decision must be taken to control this situation, unless it is now to be overruled." 69 S.Ct. at 1308.

Mr. Justice White relied on *Brinegar, supra*, and *Carroll, supra*, in reversing *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 88 S.Ct. 1472 (1968), stating:

> "Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. (Citing *Brinegar* and *Carroll*) The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. The record before us does not contain evidence that Sheriff Kirkpatrick, Deputy Sheriff Powers, or the officers who assisted in the search had reasonable or probable cause to believe that evidence would be found in petitioners' car." 88 S.Ct. at 1475.

In *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970), Mr. Justice White quoted with approval the *Carroll* holding:

> " '[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that the vehicles are carrying contraband or illegal merchandise. * * *

> " 'The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.' . . ." 90 S.Ct. at 1980.[2]

Similarly, the administrative search cases decided by this Honorable Court provide no basis for the conclusion that the decision in *Almeida-Sanchez, supra,* was "new" law. In fact, the administrative search cases substantiate Mr. Bowen's claim that a warrant and probable cause were required before his camper was susceptible to search under the Fourth Amendment. In *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727 (1967), the Court determined that the Fourth Amendment protections of a search warrant and probable cause applied to administrative searches of private residences:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual and that the reasons put forth in *Frank v. State of Maryland,* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protection." 87 S.Ct. at 1733

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[2] See *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), where it was held that the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. 91 S.Ct. at 2035.

In a companion case, *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737 (1967), the Court held that the probable cause and warrant requirements of the Fourth Amendment applied to administrative searches of businesses:

> "The businessman like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." 87 S.Ct. at 1739 (387 U.S. at 543)[3]

It must also be remembered that this Court has consistently prohibited the infringement upon travel of United States citizens. *Aptheker v. Secretary of State,* 378 U.S. 500, 84 S.Ct. 1659 (1964); *Edwards v. California,* 314 U.S. 160, 62 S.Ct. 164 (1941); *Crandall v. Nevada,* 6 Wall. 35, 18 L.Ed. 745 (1868). The stopping and searching of Bowen and his vehicle fifty miles within the international boundaries of the United States certainly infringed upon his right to travel.

The Government should not be allowed to ignore the long standing principles clearly announced in the cases cited above. Such a policy would seriously undermine the Supreme Court's position as the final arbitrator of

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[3] cf. *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. 1593 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 90 S.Ct. 774 (1970). Both of these cases require warrants before the fruits of a search of a business establishment may be introduced against the accused. Further, as these cases involve searches of well regulated business (firearms and liquor), the Court reasoned that the benefit of conducting these businesses allow the Government certain practices which would not be available against a private citizen. It certainly cannot be argued that Mr. Bowen was engaged in a "regulated business' when his vehicle was stopped and searched by immigration agents as he was driving on the open highway.

constitutional doctrine.

As can be seen from a review of the above cases decided by this Honorable Court, John Lee Bowen is not claiming the benefit of a decision overruling or enlarging "then applicable constitutional norms;" rather, he seeks the application of well established principles of constitutional law consistently delineated by this Court. Consequently, the question here is not whether *Almeida-Sanchez, supra,* should be applied retroactively, but whether 1925 *Carroll,* 1931 *Husty,* 1949 *Brinegar,* 1968 *Dyke,* 1970 *Chambers,* 1967 *Camara,* 1967 *See* 1868 *Crandall,* 1941 *Edwards,* and 1964 *Aptheker* should be applied prospectively to unconstitutional searches occurring after those dates. The affirmative answer to that question cannot seriously be disputed.

II.

ASSUMING, ARGUENDO, THAT THE DECISION OF THE NINTH CIRCUIT REQUIRING PROBABLE CAUSE AND A WARRANT TO SEARCH FOR ALIENS AT CHECKPOINTS FAR REMOVED FROM THE INTERNATIONAL BOUNDARIES OF THE UNITED STATES IS "NEW LAW," THE HOLDING IN THAT DECISION MUST BE APPLIED TO JOHN LEE BOWEN HIMSELF FOR THAT DECISION TO MEET CASE OR CONTROVERSY REQUIREMENTS OF ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION.

Throughout the proceedings in the lower federal Courts and before this Honorable Court, John Lee Bowen has contended that a search at a fixed checkpoint away from the functional equivalent of a border, without probable cause or warrant, is prohibited by the Fourth Amendment. The United States Court of Appeals for the Ninth Circuit, *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974) (Part I), concluded that Bowen was correct in his argument. However, the Court refused to apply the rationale of this decision to Petitioner Bowen himself.[4] This refusal would seem to be in direct violation of the "case or controversy" requirement of Article III, Section 2 of the United States Constitution which provides as follows:

> "The judicial Power shall extend to all Cases, Law and Equity arising under this Constitution, the Laws of the United States and Treaties made,

[4] See Part II of the decision located at 500 F.2d at 975.

or which shall be made, under their Authority; —to all Cases . . .; —to Controversies to which the United States shall be a party. . ."

The refusal of the Court to apply the rule involving such checkpoints to Mr. Bowen himself rendered the decision outlawing these checkpoint searches "mere dictum." This was first recognized in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967); wherein the Court stated:

"We have recognized that Wade and Gilbert are, therefore, the only victims at pre-trial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity *that constitutional adjudications not stand as mere dictum.* Sound policies of decision-making rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies,[3] and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law,[4] militate against denying Wade and Gilbert the benefits of today's decisions." 87 S.Ct. at 1972 (Footnotes omitted) (Emphasis added).

See *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 1036, n.24 (1969).[5]

[5]Underlying policy reasons concerning development and refinement of constitutional law would seem to require that the benefits of a "new" decision go to the accused challenging the "old" rule. Any other decision would discourage defendants and their attorneys from seeking review of what they feel to be "unconstitutional" rulings. Without the incentive of allowing the new rule to apply to the moving party, there would be no incentive for constitutional litigation.

III.

THE CONSTITUTIONAL PRINCIPLES REAFFIRMED IN *ALMEIDA-SANCHEZ, SUPRA*, AND *UNITED STATES V. BOWEN*, 500 F.2d 960 (9th Cir. 1974), SHOULD BE APPLIED TO JOHN LEE BOWEN WHO HAS CHALLENGED THE VALIDITY OF THE INSTANT SEIZURE AT ALL APPLICABLE JUDICIAL PROCEEDINGS INCLUDING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA; THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (TWICE) AND THE UNITED STATES SUPREME COURT (TWICE).

A. John Lee Bowen is Entitled to the Benefits of the Ruling in *Almeida-Sanchez* Because his Cause was Pending Before the United States Supreme Court on Direct Review when *Almeida-Sanchez* was Decided.

John Lee Bowen has challenged the validity of a fixed checkpoint search sixty miles away from the international boundaries of the United States from January 19, 1971 until the present. On May 9, 1974, the United States Court of Appeals for the Ninth Circuit, in interpreting *Almeida-Sanchez, supra*, held that searches conducted at fixed checkpoints, away from the functional equivalent of a border, without probable cause or warrant, were unconstitutional. However, even though John Lee Bowen's cause was pending before this Honorable Court when *Almeida-Sanchez* was decided, and the cause was then remanded to the Ninth Circuit for action not inconsistent with

Almeida-Sanchez, the benefit of the instant decision was not applied to Mr. Bowen himself.

This unconscionable result is in direct contradiction with the results reached by the United States Courts of Appeal for the Fifth and Tenth Circuits. In *United States v. King*, 485 F.2d 353 (10th Cir. 1973), the Court answered the contention that *Almeida-Sanchez* should not apply to the litigant in that case. The Court held:

> "In our view, that argument has no application to one in King's position. King, like *Almeida-Sanchez*, challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and has pursued his challenge as well. And King now asks that he be given the same relief as has been afforded in *Almeida-Sanchez*. We agree." 485 F.2d at 359.

In *United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973), the Court replied to a similar argument by emphasizing that the appellant in that case, like *Almeida-Sanchez*, had challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and had continued to press that challenge throughout the proceedings:

> "And Maddox now asks that he be afforded the same relief as has been afforded in *Almeida-Sanchez*. We agree. 485 F.2d at 363.

In *United States v. Byrd*, 483 F.2d 1196 (5th Cir. 1973), the Court concluded that an appellant who was in exactly the same position on appeal as John Lee Bowen was before the Ninth Circuit on remand, should

be afforded relief under the doctrine of *Almeida-Sanchez*. In that case, the Court did not even deem it necessary to comment on the obvious point that defendants such as Byrd and Bowen, whose cases were on appeal before the Supreme Court at the same time as *Almeida-Sanchez*, should be allowed relief.

These decisions by the Fifth and Tenth Circuits were consistent with previous United States Supreme Court decisions concerning cases pending on direct review at the time a Supreme Court decision was rendered. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229 (1963); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623 (1963); *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965).

To refuse to hold *Almeida-Sanchez*, *supra*, applicable to John Lee Bowen would be a grave injustice in the instant factual situation. As previously discussed, (see Argument I, *supra*) *Almeida-Sanchez* was not a "new" decision and, in fact, it was "foreshadowed" by previous Supreme Court decisions (see Argument III(B) *infra*). At each and every stage of the proceedings Mr. Bowen has contested the constitutionality of the search for, and seizure of, contraband in his camper. Mr. Bowen anticipated the *Almeida-Sanchez* decision and exhausted every possible avenue to avail himself of his Fourth Amendment rights. It would be a terrible injustice to deny Mr. Bowen the protections enunciated in *Almeida-Sanchez*, *supra*, in this instance.

Petitioner is not a "Johnny-Come-Lately" who is trying to take advantage of a recent Supreme Court decision; he is an individual who has demanded his rights at every stage of the proceedings against him. In

this light, it is important to note that the search of Petitioner's vehicle took place on January 19, 1971. Neither the decision in the Supreme Court nor the decision in the United States Court of Appeals for the Ninth Circuit in *Almeida-Sanchez, supra,* gives the date for the seizure in that matter. However, Petitioner is of the belief that the search in *Almeida-Sanchez* took place prior to January 19, 1971. It would be an anomaly to say that *Almeida-Sanchez,* who was searched prior to Petitioner, could have the evidence introduced against him suppressed, while Petitioner, who was searched at a later date, and who pursued the same avenues as *Almeida-Sanchez,* could not.

B. The Decision in *Almeida-Sanchez, supra,* and in *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974), Part I, was Foreshadowed by Previous Decisions of this Honorable Court and for this Reason John Lee Bowen Should Have the Benefit of Said Decision.

As indicated in Argument I, *supra,* the decision of this Honorable Court in *Almeida-Sanchez, supra,* was clearly foreshadowed by previous decisions of this Court.[6] For this reason, John Lee Bowen is in a

[6]See *Carroll v. United States, supra; Husty v. United States, supra; Brinegar v. United States, supra; Dyke v. Taylor Implement Co., supra; Chambers v. Maroney, supra; Camara v. Municipal Court, supra; See v. Seattle, supra; Aptheker v. Secretary of State, supra; Edwards v. California; supra;* and *Crandall v. Nevada, supra.*

different situation than the moving parties in other cases in which this Court has held the controlling decision not to be retroactive to matters on direct appeal.[7] As was stated in *Williams v. United States,* 401 U.S. 646, 91 S.Ct. 1148 (1971):

> "The petitioners in both *Linkletter* and *Desist* were convicted in proceedings that conformed to all *then applicable constitutional norms* . . . Each defendant, Linkletter by the habeas corpus route, and Desist on direct appeal, claimed the benefit of a later decided case and demanded a new trial . . . In these circumstances we found no constitutional warrant for setting aside either conviction." (Emphasis added) 91 S.Ct. at 1153 (401 U.S. at 654, 655).

Further support for this proposition is found in *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772 (1966), where the Court stated:

[7]Thus, *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160 (1971) held *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968), which overruled *Lewis v. United States,* 348 U.S. 419, 75 S.Ct. 415 (1955) not to be retroactive; *Williams v. United States,* 401 U.S. 646, 91 S.Ct. 1148 (1971), held *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034 (1969), which overruled *United States v. Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430 (1950) not to be retroactive; *Desist v. United States, supra,* held *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507 (1967), which overruled *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564 (1928), not to be retroactive; *Tehan v. United States,* 382 U.S. 406, 86 S.Ct. 459 (1966), held *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229 (1965) which overruled *Adamson v. California,* 332 U.S. 46, 67 S.Ct. 1672 (1947), not to be retroactive; and *Linkletter v. Walker, supra,* held *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (1965), which overruled *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359 (1949), not to be retroactive.

> "Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." 86 S.Ct. at 1779.[8]

For these reasons, John Lee Bowen should be entitled to the benefit of the rule announced in *Almeida-Sanchez, supra,* and applied to fixed checkpoints in *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974).

C. Application of the Retroactivity Test First Enunciated in *Linkletter v. Walker* Indicates that John Lee Bowen Should be Given the Benefit of the Rule Prohibiting Warrantless Probable Causeless Searches of Vehicles at Fixed Checkpoints Within the International Boundaries of the United States Which are not the Functional Equivalent of the Border.

The Supreme Court has devised three criteria to be applied to the determination whether new constitutional rules affecting criminal trials are to be applied retroactively or prospectively.

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the affect on the administration of justice of a retroactive application of the new standards." 87 S.Ct. at 1970

Of these factors, the most important is the purpose to be served by the new constitutional rule. *Desist v.*

[8]See *Michigan v. Payne,* 412 U.S. 47, 93 S.Ct. 1966, 1971 (1973); *Adams v. Illinois,* 405 U.S. 278, 283, 92 S.Ct. 916, 920 (1972).

United States, supra. The question to be answered is whether the purpose of the rule is advanced by applying the rule retrospectively. The factors of police reliance and burden placed on the administration of justice by retroactive application have been significant in retroactivity determinations "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." *Desist v. United States, supra.*

1. *Purpose*: The purposes of the *Almeida-Sanchez, supra,* decision were to reaffirm prior case law relating to automobile searches, to enforce the Fourth Amendment, to protect the fundamental right of privacy by deterring illegal police action, and to protect the integrity of the judicial system. As *Almeida-Sanchez* has an exclusionary purpose, it is contended by the Government that it should have only prospective application. Since the decision in *Linkletter v. Walker, supra,* which gave partial retroactivity to the exclusionary rule of *Mapp v. Ohio, supra,* by applying it to all cases not final on the date of the *Mapp* decision, this Court has not given retroactive application to three Fourth Amendment decisions.

The decision in *Almeida-Sanchez* is quite unlike the decisions in the other Fourth Amendment exclusionary cases, and the purpose of the *Almeida-Sanchez* rule will indeed be advanced by retroactive application. *Almeida-Sanchez* applied well established Fourth Amendment law to protect the right of privacy by excluding from evidence materials seized without a warrant and without probable cause. *Almeida-Sanchez* announced no new rule of law, but was simply the application of the principles of *Weeks v. United States, supra; Carroll v.*

United States, supra; and *Camara v. Municipal Court, supra*, to a Government practice in contravention of these principles. Consequently, while *Almeida-Sanchez* is a Fourth Amendment case and applies the exclusionary rule, it is unlike other Fourth Amendment decisions in recent years since it did not amplify the evidentiary exclusionary rule, but affirmed existing standards that the Government had attempted to avoid. It is apparent that any decision with the purpose of reaffirming existing constitutional doctrine must receive retroactive application in order to advance the purposes of that decision.

Further, part of the purpose of the exclusionary rule has been ignored in previous decisions of this Court concerning retroactivity. Specifically, the Court talks to the aspect of the exclusionary rule of deterring illegal police conduct but it does not speak to the other purpose of the exclusionary rule which is the maintenance of the integrity of the judicial system. This purpose was established in *Weeks v. United States, supra*, where the Court stated:

> "The effect of the Fourth Amendment is to put the Courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to *forever* secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, *should find no sanction in the judgments of the courts* which are charged *at all times* with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 34 S.Ct. at 344. (Emphasis added)

See *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

2. *Reliance*: The Government can point to no Supreme Court decision or statute authorizing such governmental practices as occured in the instant case. On the contrary, the applicable Supreme Court decisions and statutes, as the Court held in *Almeida-Sanchez*, provided no support for the legality of such searches. In this respect, the Government is in the same position as the petitioner in *Desist v. United States, supra*, whose case arose prior to the decision in *Katz v. United States, supra*. There petitioner argued that Supreme Court decisions leading to *Katz* had so undermined prior cases distinguishing between trespassory searches and those without physical penetration of premises, that that doctrine could no longer be considered controlling. Consequently, the petitioner contended that the decision in *Olmstead v. United States, supra*, not overruled until *Katz*, should not have been applied to electronic surveillance conducted before the date of that decision. The Court rejected this argument completely. Similarly, in this case, any Government argument that has relied on developing constitutional law to support *Almeida-Sanchez*-type searches should likewise be rejected. Surely,. if a defendant cannot rely upon case law evolution ultimately leading to a new decision to permit application of the new law to his case, the Government may not rely upon it to bolster its authority to engage

in searches and seizures ultimately declared illegal by the Supreme Court.[9]

Respondent further justifies denial of relief to Bowen on the premise that law enforcement relied upon the constitutionality of Title 8, C.F.R. §287.1(1)(2). This Honorable Court has never authoritatively construed this regulation to be constitutionally valid and no elected legislative body has passed such legislation. Therefore, the Justice Department's reliance upon its own administrative regulation is misplaced.

In any event, reliance on this regulation was unwarranted because of the fundamental principle of constitutional law that the Constitution cannot be amended by mere legislation or administrative regulation. *United States v. Arizona*, 400 U.S. 112, 91 S.Ct. 2060 (1970); *Marbury v. Madison*, 1 Cranch 137 (1803).

3. *Effect*: There is also the factor of the effect of the holding of retroactivity upon the administration of justice. Since we deal only with the issue at hand, that is, the retroactive application of *Almeida-Sanchez* to the case pending on appeal at the time of the *Almeida-Sanchez* decision, it can affirmatively be said that there will be little effect on the administration of justice. Cases not yet finalized may ultimately have to be reheard for many reasons, and this is fully accepted as a

[9]In other words, the Government contention that Title 8, U.S.C. §1357 and Title 8 C.F.R. §287.1(a)(2) as well as the more recent decisions of the Ninth Circuit evolved and displaced the probable cause requirement of *Weeks, Carroll* and *Camara* (so that the latter no longer controlled immigration car searches) simply do not hold water as *Almeida-Sanchez* made clear. Having been made clear, the Government is in no better position than the petitioner in *Desist* to argue reliance on such a rationale as a basis for prospective only relief.

part of our system of justice. Until such cases are final and the legal system's values respecting finality come into a play, cf., *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1171 (Harlan, J., concurring and dissenting) (1971), there is no deleterious effect upon the administration of justice of a retroactive application of a decision of the Supreme Court.

4. *Policy*: There are strong policy reasons why the supervisory powers of this Court should be invoked to apply *Almeida-Sanchez, supra,* and *Bowen v. Untied States*, 500 F.2d 960 (9th Cir. 1974), to John Lee Bowen whose case is currently before this Court on direct appeal. Many of these cases arrived on stipulated fact trial records in which defendants forfeited obvious plea bargaining advantages derived from guilty pleas in return for possible reversals after trial under *Almeida-Sanchez*. See *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971). By the practice of holding appeals in abeyance pending the Supreme Court decision in *Almeida-Sanchez*, the lower Courts affirmatively encouraged this practice. Now that *Almeida-Sanchez* has been decided in the accused's favor, for this Court to exclude the pending appeals on direct review from the benefits of the decision will cruelly dash the reasonable expectations of litigants who surrendered plea bargains in reliance upon the application of *Almeida-Sanchez* to their cases.[10]

[10]Petitioner is of the opinion that the "three-pronged retroactivity test" is fundamentally unfair when applied to cases which are on direct review at the time of the Supreme Court's decision. For this reason, John Lee Bowen would urge this Court to reconsider this test enunciated in *Stovall v. Denno, supra*, and to adopt the position expressed by Mr. Justice Harlan in his concurring and dissenting opinion in *United States v. Williams* and *Mackey v. United States*, 401 U.S. 675, 91 S.Ct. 1171 (1971).

If no Supreme Court decision relating to the exclusionary rule is to be given any retroactive effect, the Government may, with impunity, conduct illegal searches under the aura of promulgated search regulations or past patterns of conduct. It could then argue reliance on its own illegal regulations or practices to sustain a prospective only application of the Supreme Court decision invalidating its practice. Prospective application in such a case will take away the incentive the Government may have to act with greater caution and consideration in the drafting of regulations approaching the outer limits of the Fourth Amendment.[11]

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[11]If Respondent's argument is adopted, the lower federal courts can disregard established constitutional principles when new factual situations develop and incarcerate accused citizens upon this departure from precedent. The accused will then have no means of release from this aberration of established authority unless his particular case is reviewed by the United States Supreme Court and reversed or, unless he is not prosecuted until the United States Supreme Court rules on that particular problem. This simply cannot be the law.

CONCLUSION

For the aforementioned reasons, John Lee Bowen should be given the benefits of the decision in *Almeida-Sanchez v. United States, supra*, and of Part I of the decision in *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974). The application of these decisions to Mr. Bowen will require the exclusion of the seized marijuana and pills from evidence and it will necessitate a remand to the United States District Court for the Southern District of California to determine whether there is enough admissible evidence to proceed to trial against Mr. Bowen.

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Respectfully submitted,

MICHAEL D. NASATIR, of
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 653-3303

JERALD W. NEWTON, of
Newton, Re & Russell
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 655-5011

Attorneys for Petitioner

APPENDIX

ARTICLE III.–THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jursidiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,

both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

AMENDMENT IV– SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V–CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§1357. Powers of immigration officers and employees–Powers without warrant

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant–

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United states in violation of

any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

Administration of oath; taking of evidence

(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

Search without warrant

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search. June 27, 1952, c. 477, Title II, ch. 9, §287,66 Stat. 233.

Title 8, C.F.R. §287.1(a)(2)

"(2) *Reasonable distance.* The term 'reasonable distance,' as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section."

Supreme Court, U. S.
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No. 73-6848

In the Supreme Court of the United States

OCTOBER TERM, 1974

JOHN LEE BOWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
MARK L. EVANS,
Assistant to the Solicitor General,
SIDNEY M. GLAZER,
R. H. WALLACE, Jr.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (A. 74–118) is reported at 500 F. 2d 960.

JURISDICTION

The *en banc* judgment of the court of appeals was entered on May 9, 1974. The petition for a writ of certiorari was filed on June 7, 1974, and was granted on October 15, 1974 (A. 119). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which held that a warrantless "roving patrol" search of an automobile

for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's proscription against unreasonable searches and seizures—should be extended to invalidate a similar search for aliens at a fixed Border Patrol checkpoint.

2. Whether, if *Almeida-Sanchez* should be so extended, the extension should apply to the search in this case, which took place prior to the decision in *Almeida-Sanchez.*

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of having smuggled 356 pounds of marihuana into the United States from Mexico (count 1), having received, concealed, and facilitated the transportation of the marihuana knowing it to have been illegally imported (count 2), and having illegally possessed 158 benzedrine tablets (count 3), in violation of 21 U.S.C. (1964 ed.) 176(a) and 331 (q)(3)(B) (A. 23–24, 57–59). He was sentenced to concurrent terms of seven years' imprisonment on counts 1 and 2 and to five years' probation on count 3 (A. 58–59).

On June 16, 1972, the court of appeals affirmed petitioner's conviction *per curiam* in an opinion reported at 462 F. 2d 347 (A. 69–70). This Court thereafter vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (A. 71; 413 U.S. 915). On remand, the court of appeals again affirmed petitioner's conviction (A. 74–118).

1. On January 19, 1971, Border Patrol Agent Frank Ortmeier was on duty checking northbound traffic at a fixed immigration checkpoint on California State Highway 86, near the junction of that highway and State Highway 78, in Imperial County, California (A. 34).[1] At about 10:05 p.m. on that date,

[1] The checkpoint in question was described in *United States* v. *Baca*, 368 F. Supp. 398, 413 (S.D. Cal.), as follows:

"The Border Patrol has established a checkpoint on Route 86 west of the Salton Sea National Wildlife Refuge just north of the intersection of State Route 78. This location is approximately 36 air miles and 49 road miles from the Mexican border. The checkpoint is bordered on the east by farm land extending for about three miles to the Salton Sea. To the west and south of this checkpoint lies desert.

"At this location the Border Patrol has a building and traffic check signs together with blinker lights. A power source is located at the facility. The signs are of the usual type and the floodlights at night cause the area to be very well lit. As can be seen from photographs introduced by the government, the area is desolate country with virtually no inhabitants between the checkpoint and the border.

"The Border Patrol attempts to keep this checkpoint operating on a 24-hour basis and in fiscal 1973 they operated around 6,000 hours which is approximately 65 to 70 percent of the time.

"At this checkpoint the checking operations are of the usual type with about 75 percent of the vehicles traveling through it being stopped for inquiry with around 10 percent to 15 percent of all vehicles being detained for further inspection. It is estimated that over half of the vehicles at this checkpoint have come directly from Mexicali or have occupants who walked across the border at Calexico.

"During the first ten months of calendar year 1973 ap-

petitioner approached the checkpoint driving a pick-up truck with a "camper" on the bed, and he was stopped for a routine immigration inspection (A. 34–35). After petitioner identified himself as a United States citizen, Agent Ortmeier asked him "to open up the back of the camper for a search for illegal aliens" (A. 36).

Petitioner complied with the request, and as soon as the camper was opened Agent Ortmeier, who was familiar with the odor of marihuana (A. 42–43), "noticed a strong odor of marihuana coming from the back of the camper" (A. 36, 41). Agent Ortmeier entered the camper and, using a flashlight, observed what "appeared to be bedrolls or someone laying upon the mattress" in the forward portion of the camper that extended up and over the top of the truck cab (A. 36). As he approached the mattress, he discovered that the objects on the bed were two "backpacks," and at the same time he observed in plain view what appeared to be "kilo bricks" of marihuana in cellophane-wrapped packages underneath the mattress (A. 36). Upon examining the contents of one of the packages, Agent Ortmeier concluded that the substance therein was marihuana (A. 36–37). He then placed petitioner under arrest (A. 37).

A subsequent search of the camper revealed additional marihuana concealed in a cupboard and under-

proximately 690 deportable aliens were apprehended at this checkpoint according to the detailed traffic logs maintained by the Border Patrol.

"This checkpoint is located on a point with one of the lowest volumes of traffic along Route 86 north of the population centers of Calexico, Brawley and El Centro."

neath seats in the camper (A. 37). The benzedrine tablets were found in the pocket of a jacket in the truck's passenger compartment (A. 37, 52–53).

Agent Ortmeier testified that there was nothing unusual about petitioner or his vehicle that raised any particular suspicion that the vehicle contained aliens illegally present in this country (A. 40–41). On the date in question, the volume of traffic at the checkpoint was light, and every car coming through the checkpoint was being stopped, except for vehicles containing persons whom the agents knew and who regularly traveled through the checkpoint (A. 34–35, 39, 40).

Petitioner's pretrial motion to suppress the evidence derived from the search of his camper was denied by the district court following a hearing (Tr. 48–49).[2]

2. The court of appeals affirmed, holding that "[t]he search and seizure were plainly lawful" (A. 70; 462 F. 2d at 348). A petition for a writ of certiorari was filed by petitioner and was held by this Court pending its decision in *Almeida-Sanchez*. The Court ultimately ruled in that case that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained aliens present in this country unlawfully, violated the Fourth Amendment's prohibition against unreasonable searches and seizures. The Court thereafter vacated the judgment of the court

[2] "Tr." refers to the transcript of the proceedings in the district court, which is part of the record in this case.

of appeals in the present case and remanded the case for further consideration in light of *Almeida-Sanchez* (A. 71; 413 U.S. 915).

3. On remand, the court of appeals, sitting *en banc*, again affirmed petitioner's conviction, setting forth its reasons in a lengthy two-part opinion (A. 74–118). In Part I, the court held by a 7–6 vote (1) that "*Almeida-Sanchez* is as applicable to fixed-checkpoint searches as to roving-patrol searches" (A. 85) and that evidence seized in a warrantless, non-probable-cause, checkpoint search of an automobile for aliens must be suppressed under the principles of *Almeida-Sanchez* unless the search can be said to be the "functional equivalent" of a border search; and (2) that "the search is a functional equivalent of a border search" only if it "takes place at a location where virtually everyone searched has just come from the other side of the border" (A. 81) or if it can be said with "reasonable certainty" either that the contents of the vehicle were aboard when the vehicle crossed the border or, if the vehicle has not itself crossed the border, that the persons or things in it recently entered or were brought into this country illegally (A. 81–83). The court concluded that "the record in this case clearly indicates that the search conducted was not the functional equivalent of a border search" (A. 84).

In Part II of the opinion, however, the court held that the principles of *Almeida-Sanchez,* as applied to searches at fixed checkpoints, created a new constitutional rule that should not be applied retroactively to searches that occurred prior to June 21, 1973, the

date of this Court's decision (A. 100–110). Since the search in the present case occurred prior to June 21, 1973, the court held that petitioner's motion to suppress was correctly denied (A. 110).[3]

SUMMARY OF ARGUMENT

1. The court of appeals held that, like the warrantless roving patrol search in *Almeida-Sanchez,* a routine, warrantless search of a vehicle for aliens at a fixed Border Patrol checkpoint is unreasonable under the Fourth Amendment unless the checkpoint is at the functional equivalent of the border. It upheld petitioner's conviction, however, because the search in this case took place prior to this Court's decision in *Almeida-Sanchez.* Petitioner's brief in this Court addresses only the retroactivity question.

We submit, however, as an alternative ground for affirmance, that the checkpoint search was reasonable notwithstanding the absence of a warrant. Relying upon the discussion of this issue in our brief in *United States* v. *Ortiz,* No. 73–2050, we argue that checkpoint operations stand on a different legal footing from roving patrol operations and that a warrant would not materially contribute to the reasonableness of the

[3] The majority opinion in Part II represented the views of seven judges. Four other judges concurred in the holding that the new rule should apply only to searches conducted after the date of the decision in *Almeida-Sanchez*, but they would have ruled that petitioner himself, "as the moving party in the case in which this new rule has been announced, * * * is fully entitled to its protection" (A. 111). Two judges dissented on the ground that *Almeida-Sanchez* created no new rule for retroactivity purposes (A. 111–118).

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former even if it can be said to enhance the reasonableness of the latter.

2. If the Court disagrees with that argument and upholds the court of appeals' ruling that warrantless checkpoint searches are *per se* unreasonable, then we agree with petitioner that he should be given the benefit of that ruling. He was the moving party in the case in which the Ninth Circuit first held, overruling a long line of its prior decisions, that warrantless checkpoint searches are unlawful. Since the decision in petitioner's case, as we argue in *Ortiz,* announced a new rule in the Ninth Circuit, the decision-making policy ordinarily followed by this Court in criminal cases suggests that petitioner should be accorded the status of a chance beneficiary of that new rule. *Stovall* v. *Denno,* 388 U.S. 293, 301.

3. Petitioner would not be entitled to that special status, however, if this Court were to conclude, as the court of appeals apparently did, that it was this Court's decision in *Almeida-Sanchez,* rather than the court of appeals' decision in the present case, that announced the new rule in the Ninth Circuit with respect to the validity of warrantless checkpoint searches.[4] On

[4] It is clear, we submit, that there has been, since the initial affirmance of petitioner's conviction, a total transformation of the prevailing law on the checkpoint issue in the Ninth Circuit. If the change was not accomplished by that court's decision in the present case, as we believe, then it must have been implicit in this Court's decision in *Almeida-Sanchez*, though the search in that case was conducted by a roving patrol.

that assumption, *Almeida-Sanchez,* as a new application of the exclusionary rule, would be applicable only to searches conducted after the date of the decision in that case.

Applying *Almeida-Sanchez* to searches conducted before the decision was announced would not further the principal purpose of the exclusionary rule, which is to deter *future* unlawful police conduct. It would punish the Border Patrol and the public for law enforcement conduct carried on in good faith reliance upon the prevailing law at the time.

Nor, in those circumstances, should the principles of *Almeida-Sanchez* be applied retroactively to cases like this one simply because such cases were pending on direct review at the time *Almeida-Sanchez* was decided. Since the decision in *Stovall* v. *Denno, supra,* this Court has consistently declined to distinguish for retroactivity purposes between cases in which the conviction was final at the time a new rule was announced and cases that were at various stages of trial and direct review. Since the exclusionary rule is designed to deter police misconduct, it is the date upon which the law enforcement conduct took place, not the date on which the conviction became final, that should govern the application of a new Fourth Amendment ruling.

ARGUMENT

I

THE LIMITED SEARCH OF PETITIONER'S VEHICLE FOR ALIENS, CONDUCTED AT A FIXED IMMIGRATION TRAFFIC CHECKPOINT, WAS REASONABLE UNDER THE FOURTH AMENDMENT NOTWITHSTANDING THE ABSENCE OF A WARRANT AND OF PARTICULARIZED PROBABLE CAUSE

Petitioner's retroactivity contentions in this case presuppose the correctness of the Ninth Circuit's holding in Part I of its opinion that a routine stop and search of a vehicle for aliens at a fixed Border Patrol checkpoint is unlawful in the absence of a warrant unless the checkpoint can be said to be the functional equivalent of the border. We submit, however, that a limited warrantless search of a vehicle for concealed aliens, conducted at a fixed inland checkpoint, is not *per se* unreasonable under the Fourth Amendment, even if it is not the functional equivalent of a border search. Unlike the warrantless roving patrol search invalidated by this Court in *Almeida-Sanchez,* a limited checkpoint search of a vehicle for aliens does not depend for its reasonableness upon advance judicial approval, through the warrant procedure, of the checkpoint's operation.

Our argument on this issue is set forth in our brief in *United States* v. *Ortiz,* No. 73-2050, pp. 15–43, and we do not repeat it here.[5] As we show in our brief in

[5] *Ortiz* involves a checkpoint search that took place *after* the decision in *Almeida-Sanchez.* The court of appeals reversed the conviction on the authority of its *en banc* decision in the present case.

that case, there exists an area-wide equivalent of probable cause for the limited vehicle searches conducted at fixed Border Patrol checkpoints in the area of the Mexican border, where the concentration of illegally present aliens is high and where inland traffic checkpoints are essential to the effective enforcement of the Nation's immigration laws. Moreover, as we also show in our brief in *Ortiz,* advance judicial approval for the operation of a checkpoint would not materially enhance the reasonableness of the limited searches conducted at the checkpoint. The significant differences between checkpoint and roving patrol operations serve to distinguish the present case and *Ortiz* from *Almeida-Sanchez.*

If the Court agrees with our argument on the checkpoint issue in *Ortiz,* that would provide an alternative ground for affirmance of the judgment of the court of appeals in the present case.[6] If, as we submit, the Border Patrol officers acted lawfully in stopping petitioner's vehicle at the checkpoint and inspecting the camper for the presence of concealed illegal

[6] The issue is properly before the Court in this case even though the government did not file a cross-petition for a writ of certiorari. It is settled that "[t]he prevailing party may * * * assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court" (*Dandridge* v. *Williams,* 397 U.S. 471, 475, n. 6). See also Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?,* 87 Harv. L. Rev. 763 (1974). We do not seek, and our argument would not logically compel, any modification of the court of appeals' judgment in this case affirming petitioner's conviction.

aliens,[7] then the seizure of the marihuana discovered in the course of that inspection, and the seizure of the benzedrine tablets discovered in a subsequent search incident to petitioner's arrest, were lawful, and petitioner's motion to suppress was for that reason correctly denied by the district court.

When Agent Ortmeier, in the course of his inspection of the camper for illegal aliens, detected the odor of marihuana and observed in plain view the brick-shaped, cellophane-wrapped packages under the mattress in the camper, he had probable cause to believe that the packages contained marihuana, and he was justified in inspecting their contents. See, *e.g., United States* v. *Blackstock,* 451 F. 2d 908, 910 (C.A. 9). The

[7] Although the search in the present case was conducted at a different checkpoint from the one involved in *Ortiz*, that difference should not lead to a different result in this case. Like the San Clemente checkpoint, the Route 86 checkpoint at which petitioner's vehicle was stopped is an integral and effective part of the network of checkpoints in the Southern California area and is located and operated in a manner reasonably designed to minimize disruption of and inconvenience to the innocent traveling public. The district court in *United States* v. *Baca*, *supra*, which found that both checkpoints were the functional equivalents of the border, stated (368 F. Supp. at 417):

"The checkpoint on Route 86 is situated at a point with one of the lowest volumes of traffic on that highway, thus tending to cause little intrusion and inconvenience to travelers, as well as scarcely impeding the goal of safe driving. This checkpoint is not easy to intentionally circumvent without being steered into another checkpoint on another highway, in that it is bordered by the Salton Sea on one side and desert on the other. It lies just 36 air miles from the Mexican border and it has been estimated that over half of the vehicles reaching this checkpoint have come directly from Mexicali, B.C., Mexico."

agent's arrest of petitioner and seizure of the marihuana, the subsequent search of the vehicle incident to the arrest (see *Adams* v. *Williams,* 407 U.S. 143, 149), and the seizure of the additional marihuana and benzedrine tablets were therefore valid under the Fourth Amendment.

II

IF THE COURT DISAGREES WITH OUR CONTENTIONS ON THE CHECKPOINT ISSUE BUT DETERMINES THAT THE DECISION OF THE COURT OF APPEALS IN THIS CASE WAS A DEPARTURE FROM PRIOR LAW IN THE NINTH CIRCUIT, THEN PETITIONER SHOULD, AS A MATTER OF SOUND DECISION-MAKING POLICY, BE AFFORDED THE BENEFITS OF THE NEW RULE ESTABLISHED IN HIS CASE

If this Court disagrees with our contentions in point I of this brief and upholds the court of appeals' conclusion that a routine warrantless checkpoint search is *per se* unreasonable, then it must reach petitioner's contention that he should be afforded the benefits of the rule even though the search of his vehicle took place more than two years prior to this Court's decision in *Almeida-Sanchez.*

As we understand petitioner's brief, he contends, first, that no retroactivity issue is even presented, because both *Almeida-Sanchez* and the court of appeals' decision in the present case merely reaffirmed long-standing constitutional principles never deviated from by this Court (Br. 6–12), and both decisions were clearly foreshadowed by this Court's prior decisions (Br. 18–20). Second, petitioner argues that if, for purposes of retroactivity analysis, *Almeida-Sanchez* is

viewed as a new application of the Fourth Amendment exclusionary rule, he should not be deprived of the benefits of that rule, even though the search of his vehicle was conducted prior to this Court's decision in that case. Petitioner reasons that the criteria applied in this Court's prior retroactivity decisions support a retrospective application of the principles of *Almeida-Sanchez* (Br. 20–26) and, in any event, that the decision should at least be applied to all cases in which the defendant had raised and preserved the issue and which were pending on direct review at the time of the decision (Br. 15–18, 25 n. 10). Petitioner's third argument is that if the Ninth Circuit's decision in the present case is viewed as establishing a new rule for that circuit with respect to warrantless checkpoint searches, then petitioner, as the moving party in the case that established the new rule, should be entitled to its benefits (Br. 13–14).

We argue in our brief in *Ortiz,* pp. 44–55, that the Ninth Circuit's decision in Part I of the present case, which overruled a long line of prior Ninth Circuit decisions upholding the validity of warrantless checkpoint searches, was a new application of the Fourth Amendment exclusionary rule in that circuit and should be applied prospectively only. If this Court agrees with that contention, then we concur in petitioner's view that he should be given the benefit of the new rule established at his instance by the court of appeals.

We do not agree, however, with petitioner's assertion that a purely prospective ruling by the court of

appeals would be "in direct violation of the 'case or controversy' requirement of Article III, Section 2" (Br. 13). This Court stated in *Linkletter* v. *Walker,* 381 U.S. 618, that "the Constitution neither prohibits nor requires retrospective effect" for new constitutional rules (381 U.S. at 629); "there seems to be no impediment—constitutional or philosophical—" to giving a decision purely prospective effect (*id.* at 628). See also *Johnson* v. *New Jersey,* 384 U.S. 719, 733. Indeed, this Court has done precisely that when the circumstances have made it appropriate to apply the decision only to future cases. See *James* v. *United States,* 366 U.S. 213, 221–222 (opinion of Warren, C. J.); *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 422–423; *Allen* v. *State Board of Elections,* 393 U.S. 544, 572.

Although the Constitution does not require that petitioner be given the benefits of the new rule established in his case, this Court generally follows the practice in criminal cases of applying a new constitutional ruling to the litigant in whose case it was announced. "Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [litigants] the benefits of * * * decisions" announcing new rules (*Stovall* v. *Denno,* 388 U.S. 293, 301; footnotes omitted). The same policy should ordinarily be followed by the courts of appeals. See, *e.g., Gaither* v. *United States,* 413 F. 2d 1061, 1085 (C.A.D.C.).

III

IF THE COURT DETERMINES THAT THE DECISION OF THE COURT OF APPEALS IN THIS CASE WAS NOT A NEW APPLICATION OF THE EXCLUSIONARY RULE, THEN PETITIONER'S CONVICTION SHOULD NOT BE DISTURBED, SINCE THE SEARCH IN HIS CASE WAS CONDUCTED PRIOR TO THE DECISION IN *ALMEIDA-SANCHEZ*

Our agreement with petitioner is limited to his third contention, which presupposes that the decision of the court of appeals in this case "was a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248) in the Ninth Circuit. But if the Court concludes, contrary to that presupposition and contrary to our submission in *Ortiz,* that the decision in this case did not announce a new application of the exclusionary rule in the Ninth Circuit, then petitioner would lose his special status as a "chance beneficiar[y]" (*Stovall* v. *Denno, supra,* 388 U.S. at 301), a status that is afforded only to the moving party in a decision announcing a new rule. The Court would then have to consider petitioner's other contentions: (1) that even the decision in *Almeida-Sanchez* announced no new rule and therefore presents no issue of retroactivity, and (2) that even if it does present such an issue, its principles should be applied retroactively, at least to litigants who had preserved the issue and whose convictions had not yet become final when *Almeida-Sanchez* was decided.

1. With respect to the threshold question whether *Almeida-Sanchez* presents a choice between retroactivity or non-retroactivity, we show in our brief in *United States* v. *Peltier,* No. 73–2000, pp. 14–27, that, as applied to roving patrol searches, *Almeida-Sanchez* was a new application of the exclusionary rule that presents a retroactivity issue. The decision was a sharp break with prior law in the courts of appeals, and it disrupted an immigration law enforcement practice long accepted and widely relied upon by the Border Patrol in the Mexican border area.

It is obvious that there has also been a change in the prior law concerning the validity of warrantless *checkpoint* searches. The opinion of the Ninth Circuit panel that initially affirmed petitioner's conviction accurately reflected the prevailing law in the circuit prior to this Court's decision in *Almeida-Sanchez.* The opinion stated simply that "[t]he search and seizure were plainly lawful" (A. 70). While there may be reasonable dispute as to when the change in law occurred, it is clear that there has been a complete turnabout in the Ninth Circuit's views on the legality of warrantless checkpoint searches.

We contend in *Ortiz* (Br. 46–55) that it was the decision of the court of appeals in the present case, rather than the decision of this Court in *Almeida-Sanchez,* that changed the Ninth Circuit law with respect to checkpoint searches. But if the Court disagrees with that contention, then we submit, for the reasons stated in our brief in *Peltier,* that *Almeida-Sanchez* itself provided the requisite "clear break with the past" (*Desist* v. *United States, supra,* 394 U.S. at 248) insofar as the validity of warrantless checkpoint searches is concerned. As the majority of

the court of appeals in the present case held, "*Almeida-Sanchez,* as applied to searches at fixed checkpoints, overrules clear past precedent, both statutory and case law," and invalidates "[a] law enforcement practice authorized by our court for * * * an extensive period" (A. 103).[8] The decision therefore "measures up as a new pronouncement" (*ibid.*).

All but two of the judges in the court of appeals agreed that *Almeida-Sanchez,* as applied to checkpoint searches, was a new application of the exclusionary rule (see note 3, *supra*). Judge Hufstedler's dissenting opinion—echoed in petitioner's brief (p. 7)—stated that, in "deciding whether retroactivity is in issue, * * * the only 'old' and 'new' law that is relevant is the constitutional law enunciated by the Supreme Court" (A. 116). This Court has already held, however, that a decision of the Supreme Court on an issue of first impression may raise a retroactivity issue if it overrules a line of court of appeals decisions. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97. See our briefs in *Ortiz* (pp. 52–55) and *Peltier* (pp. 25–27).

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[8] The court of appeals stated (A. 102–103):

"Prior to *Almeida-Sanchez*, there was no indication from any of the courts of appeals that searches at fixed checkpoints were unconstitutional. Rather, the indication was that such searches were constitutional, for 35 of 36 judges who had considered the question in the three circuits involved in enforcing the immigration laws along our Mexican border had upheld immigration stops and searches. * * * For over a decade we have consistently and repeatedly upheld convictions based upon evidence seized during searches made at fixed checkpoints * * *."

The proper inquiry is not necessarily whether a prior decision of this Court was overruled but whether law enforcement officers were acting in good faith reliance upon "a different understanding of the controlling judge-made law from the rule that ultimately prevailed" (*Lemon* v. *Kurtzman,* 411 U.S. 192, 198, plurality opinion). If so, it should not matter for purposes of retroactivity analysis whether the "controlling" law had been enunciated by this Court or a court of appeals. In either event, the eventual overruling of the prior law is a sufficient break with the past to raise a retroactivity question. As the majority of the court of appeals stated (A. 101–102):

> Only a small number of the appealed federal cases are ever reviewed by the Supreme Court. As a matter of necessity, the Court must leave day-to-day application of the law to the lower courts. Therefore, law enforcement procedures must be based to a great extent upon circuit court decisions. Because of this necessity, a law enforcement practice may develop and be sanctioned by court approval for many years before it is reviewed by the Supreme Court. Where such a rule is ultimately reversed by the Court, the pronouncement is "new" simply by virtue of the fact that the people who apply the law on a day-to-day basis have not previously understood the new statement to be the proper rule.

2. Petitioner argues (Br. 20–26) that the decision in *Almeida-Sanchez* should be given retrospective effect even if it did announce a new rule. But this

Court has consistently held that new applications of the evidentiary exclusionary rule should be given prospective effect only. *Linkletter* v. *Walker, supra*; *Desist* v. *United States, supra*; *Fuller* v. *Alaska*, 393 U.S. 80; *Williams* v. *United States*, 401 U.S. 646. The "prime purpose" of the exclusionary rule "is to deter *future* unlawful police conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347; emphasis added), and "this purpose would [not] be advanced by making the rule retrospective" (*Linkletter* v. *Walker, supra*, 381 U.S. at 637).

Petitioner argues that *Almeida-Sanchez* "is unlike other Fourth Amendment decisions in recent years since it did not amplify the evidentiary exclusionary rule, but affirmed existing standards that the Government had attempted to avoid" (Br. 22). But that is simply another way of arguing that *Almeida-Sanchez* presents no choice between retroactivity and nonretroactivity. Moreover, while the majority of this Court in *Almeida-Sanchez* may have rested its decision upon established Fourth Amendment principles, the decision, as we have shown, was a novel application of those principles that departed abruptly from the manner in which the courts of appeals, Congress, and the Executive Branch had been applying the same principles in similar circumstances.

Petitioner also contends (Br. 23–24) that the Border Patrol's reliance on prior statutory and decisional authority was unjustified. As the court of appeals

aptly stated, however, "[i]f the border patrol agents cannot rely upon a statute supported by clear regulations which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval,[9] it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified" (A. 106).

3. Finally, petitioner contends that "[i]t would be a terrible injustice to deny [him] the protections enunciated in *Almeida-Sanchez,*" since he "contested the constitutionality of the search" "[a]t each and every stage of the proceedings," and his case was pending on direct review when *Almeida-Sanchez* was decided (Br. 17). But the same contention was considered and rejected by the Court in *Stovall* v. *Denno, supra*, 388 U.S. at 301:

> Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

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[9] The court of appeals' decisions upholding the constitutionality of 8 U.S.C. 1357(a)(3) and the reasonableness of stops and limited searches of vehicles for aliens conducted pursuant to the authority conferred by the statute are collected in our brief in *Peltier*, p. 16, n. 11. This Court, prior to *Almeida-Sanchez*, denied certiorari in at least two of those cases. *United States* v. *Avey*, 428 F. 2d 1159 (C.A. 9), certiorari denied, 400 U.S. 903; *United States* v. *McCormick*, 468 F. 2d 68 (C.A. 10), certiorari denied, 410 U.S. 927.

The Court in *Stovall* thus refused to apply retroactively the constitutional rule established in *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263. It held that, "for these purposes, no distinction is justified between convictions now final * * * and convictions at various stages of trial and direct review" (388 U.S. at 300).

Although some Justices have continued to express the view that litigants whose cases were pending on direct review at the time a new rule was announced should, like the moving parties in the principal cases, enjoy the benefit of the new rule,[10] the Court has repeatedly adhered to its reasoning in *Stovall*. In *Desist* v. *United States*, *supra*, in which the Court held that *Katz* v. *United States*, 389 U.S. 347, should be applied only prospectively, the majority again declined to carve out an exception for cases pending on direct review. "All of the reasons for making *Katz* retroactive [*sic*][11] also undercut any distinction between final convictions and those still pending on review. Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date." 394 U.S. at 253.

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[10] See *Desist* v. *United States*, *supra*, 394 U.S. at 258–259 (Mr. Justice Harlan, dissenting); *Williams* v. *United States*, *supra*, 401 U.S. at 665–666 (opinion of Mr. Justice Marshall); *Mackey* v. *United States*, 401 U.S. 667, 677–681 (opinion of Mr. Justice Harlan).

[11] The word apparently should be "non-retroactive" rather than "retroactive."

See also *DeStefano* v. *Woods*, 392 U.S. 631, 635, n. 2; *Williams* v. *United States*, 401 U.S. 646, 656–659 (plurality opinion); *Adams* v. *Illinois*, 405 U.S. 278, 285 (plurality opinion); *Michigan* v. *Payne*, 412 U.S. 47, 57, n. 15.

Petitioner presents no new considerations that would justify a different result in this case.[12] When, as in the present situation, a decision invalidates under the Fourth Amendment a law enforcement practice that had previously been upheld, the prevailing Fourth Amendment law at the time the officer acted should determine the applicability of the exclusionary rule in each case, and it should not matter whether or not the case was pending on direct review when the new rule was announced. It is the date of the law enforcement conduct, not the date on which the conviction became final, that is the relevant inquiry.

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[12] The Tenth Circuit applied *Almeida-Sanchez* retroactively to checkpoint search cases that were pending on direct review at the time of this Court's decision. *United States* v. *King*, 485 F. 2d 353; *United States* v. *Maddox*, 485 F. 2d 361. The court reasoned in those cases that the defendants should "be given the same relief as has been afforded in *Almeida-Sanchez*," because, like Almeida-Sanchez, they "challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and * * * pursued [their] challenge in this court as well" (485 F. 2d at 359; see also 485 F. 2d at 363). That reasoning ignores this Court's decisions in *Stovall* and subsequent cases. We submit that *King* and *Maddox* were wrongly decided.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
R. H. WALLACE, JR.,
Attorneys.

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v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MICHAEL D. NASATIR, of
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 653-3303

JERALD W. NEWTON, of
Newton, Re & Russell
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 655-5011

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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REPLY BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the search of JOHN LEE BOWEN'S camper without warrant or probable cause at a fixed checkpoint approximately 50 road miles from the international boundaries of the United States, at a point conceded not to be the functional equivalent of the international border, is unconstitutional?

2. Whether there is an area equivalent of probable cause at the Highway 86 traffic checkpoint justifying the searching of vehicles passing through this location for illegal aliens without prior judicial approval?

3. Whether JOHN LEE BOWEN is entitled to the benefit of the decision holding searches at traffic checkpoints not located at the functional equivalent of the border without probable cause or warrant to be unconstitutional?

ARGUMENT

I.

THE SEARCH OF JOHN LEE BOWEN'S CAMPER WITHOUT WARRANT OR PROBABLE CAUSE AT A FIXED CHECKPOINT APPROXIMATELY 50 ROAD MILES FROM THE INTERNATIONAL BOUNDARIES OF THE UNITED STATES, AT A POINT CONCEDED NOT TO BE THE FUNCTIONAL EQUIVALENT OF THE INTERNATIONAL BORDER, IS UNCONSTITUTIONAL.

In *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974), Part I, the Court, in an *en banc* decision, determined that the fixed checkpoint on Highway 86 was not the functional equivalent of the United States international border. For this reason, searches at this checkpoint cannot be considered "border searches" dispensing with the probable cause and warrant

standards of the Fourth Amendment.[1] *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S.Ct. 2533, 2539 (1973); *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 285 (1925). Respondent, in its brief, concedes that the search at the Highway 86 checkpoint was not the functional equivalent of a border search. Res. Br. 10.[2]

A. No Warrant was Issued by a Qualified Magistrate for the Search of Petitioner Bowen's Vehicle; Therefore, the Burden Rests Upon the Government to Justify the Search.

It has long been held that the "warrant clause" of the Fourth Amendment is to be read in conjunction with the "unreasonable search and seizure" clause when Fourth Amendment rights are alleged to have been violated. *United States v. United States District Court,* 407 U.S. 297, 92 S.Ct. 2125, 2136 (1972). The absence of a warrant makes the search "*per se* unreasonable." *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 514 (1967). The burden is on those seeking an exception for the warrant requirement to show the need for said exception. *United States v. Jeffers,* 342 U.S. 48, 72 S.Ct. 93, 95 (1951); *McDonald v. United States,* 335

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[1] Respondent raises the question of the validity of the search of Mr. Bowen's camper in this Court, even though it did not file a cross-petition for a writ of certiorari. For this reason Petitioner Bowen is now compelled to argue the merits of the underlying search even though certiorari was granted solely on the question of retroactivity of *United States v. Bowen, supra.*

[2] Res.Br. will be used here, and hereafter, to refer to Respondent's Brief in *Bowen v. United States*, 73-6848.

U.S. 451, 69 S.Ct. 191, 193 (1948). As it is conceded that the instant search was without warrant, Respondent has the burden of justifying the instant stop, search, seizure and arrest of Petitioner Bowen. App. 35-56.[3] Under existing Fourth Amendment law, a vehicle can be searched *in some instances without a warrant but, in all cases, the search must be made upon probable cause*. This Court has repeatedly warned that the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. *Coolidge v. New Hampshire*, 403 U.S. 444, 91 S.Ct. 2022, 2035 (1971). A person has an expectation of privacy in an automobile and an invasion of this privacy can only be justified if the Fourth Amendment is complied with. *Almeida-Sanchez v. United States, supra, Katz v. United States, supra.*

B. The Search of Petitioner Bowen's Vehicle at the Highway 86 Checkpoint was Conducted Without Probable Cause.

When Petitioner Bowen approached the Highway 86 checkpoint, his vehicle was stopped and he was questioned by border patrol agent Ortmeier as to his (Bowen's) citizenship. After Ortmeier ascertained that Bowen was in fact an American citizen, he (Ortmeier) ordered Bowen to open the back of the camper. App. 35. After the camper door was opened, Ortmeier allegedly detected the odor of marijuana and he ultimately discovered marijuana inside the camper. App.

[3] App. will be used here, and hereafter, to refer to the Appendix in *Bowen v. United States.*

36. No reasons justifying the opening of the camper door were given other than the fact that Agent Ortmeier desired to look in the back of the camper. Respondent apparently concedes that there was no "traditional probable cause" to search the back of the camper at this time. Res. Br. 5; Pet. Br. O. 18.[4] This Court has refused to justify the search of an interior of a vehicle, whether the vehicle is immobile or mobile, without probable cause in *all* of its past decisions. *Almeida-Sanchez v. United States, supra, Coolidge v. New Hampshire, supra; Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970); *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 88 S.Ct. 1472 (1968); *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949); *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240 (1931); and *Carroll v. United States, supra*. Pet. Br. 6-10.[5] Under the accepted, traditional concept of probable cause, it is clear that the instant stopping of Petitioner Bowen's vehicle and the search of the rear camper was unconstitutional.

[4] Pet. Br. O. refers to Petitioner's Brief in *United States v. Ortiz*. This brief was incorporated by reference by Respondent in its brief in *Bowen v. United States*, Res. Br. 10. Petitioner Bowen therefore assumes that the disclaimer of particularized probable cause by petitioners in *Ortiz*, likewise applies to Respondents in the instant case.

[5] Pet. Br. will be used here, and hereafter, to refer to Petitioner's Brief in Bowen.

II.

RESPONDENT INCORRECTLY ASSERTS THAT THE SEARCH OF PETITIONER'S VEHICLE FOR ALIENS CONDUCTED AT A FIXED IMMIGRATION TRAFFIC CHECKPOINT, WAS REASONABLE UNDER THE FOURTH AMENDMENT NOTWITHSTANDING THE ABSENCE OF A WARRANT AND PARTICULARIZED PROBABLE CAUSE FOR THE SEARCHED VEHICLE.

Recognizing that the search and subsequent arrest of Petitioner Bowen in the instant cause were without warrant and probable cause and that under traditional Fourth Amendment law the arrest and search would fail, Respondent asserts that there is an areawide equivalent for probable cause for vehicle searches at the Highway 86 checkpoint involved herein, and at the other highway checkpoints located in the southwestern United States, and that these checkpoints should be allowed to operate *without* prior judicial approval or guidance. Petitioner relies upon the record in *United States v. Baca, et al.*, 368 F.Supp. 398 (S.D. Cal. 1973), and the opinion filed therein on December 11, 1973.[6]

[6]Petitioner Bowen joins Respondent Ortiz and objects to the conclusions reached by Judge Turentine in his opinion. Res. Br. O. 3. (Res. Br. O. will be used here, and hereafter, to refer to Respondent's Brief in *Ortiz*.) Bowen will make reference to the testimony and exhibits in ***Baca, supra***, but Petitioner does not waive the substantive errors and limitations of the ***Baca*** hearing.

In reviewing the Government's attempt to create a new exception to the warrant requirement and to redefine the meaning of probable cause as it is understood in traditional Fourth Amendment discussions, this Court should consider the enlightening language of *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886):

> "Though the proceeding in question is divested of any of the aggravating incidents of actual search and seizure, yet, as beforesaid, it contains there substance and essence, and affects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." (Emphasis added.) 6 S.Ct. at 535.*

A. There is No Areawide Equivalent of Probable Cause at Highway 86 Where Petitioner Bowen Was Searched or at Other Fixed Checkpoints in the Southwestern United States.

Respondent argues with a great deal of vigor that there is an "areawide equivalent of probable cause for the limited vehicle searches conducted at fixed checkpoints." Pet. Br. O. 17-21. Respondent points out that the District Court in *Baca, supra*, found that there were from 800,000 to 1,000,000 illegal aliens in the United States and approximately 85% of these aliens are generally thought to be citizens of Mexico. Pet. Br.

O. 21. Mr. Justice Powell, in his concurring opinion in *Almeida-Sanchez, supra*, stated that there was a high concentration of illegal aliens in the Mexican border area both in absolute terms and in proportionate number to those persons legally present. The testimony at the *Baca, supra,* hearing indicated that the El Centro sector border patrol office apprehended 12,028 deportable aliens in 1970; 14,292 deportable aliens in 1971; 15,327 deportable aliens in 1972; and 23,125 deportable aliens in 1973. BT 310.[7]

The traffic checkpoints in this sector were responsible, in 1973, for apprehending 3,825 aliens. BT 360. Under the Immigration and Naturalization Service's[8] own figures, only 16-1/2% of the aliens seized in 1973 were seized at traffic checkpoints. In the same year, 2,988 illegal aliens were turned over to the I.N.S. by other law enforcement agencies. BT 362. This constituted approximately 13% of the illegal aliens apprehended in the El Centro sector in 1973. At the *Baca, supra*, hearing there was no testimony as to how many automobiles passed through the traffic checkpoints in one year, nor was there testimony as to how many vehicles were actually stopped or searched. Henry C. Felchlin, the chief patrol agent of the El Centro sector, testified that the primary means of apprehending illegal aliens is the "line watch" at the international border itself. The El Centro sector covers approximately 70 to 75 miles of the international border, and Mr. Felchlin has 140 agents under his control to watch this

[7]BT will be used here, and hereafter, to refer to Baca Transcript.

[8]From here after the Immigration and Naturalization Service will be referred to as the I.N.S.

area. BT 310. Only five miles of this 75 mile area is fenced and there is a lack of scientific equipment to help apprehend illegal aliens at the border itself. BT 313, 364. Mr. Felchlin testified that the "line watch" itself is not the best available and that it is in fact inadequate because Mr. Felchlin does not have enough manpower to watch the international border. BT 363. Felchlin has asked for approximately 50 new men each year for the past three years yet he has not received any of the requested manpower. BT 365.

Felchlin testified that the checkpoint on Highway 86 was opened approximately 6,000 hours in 1973, or about 70% of the time. BT 228. To reach the checkpoint at Highway 86, a person coming from the south would cross Interstate 80 and travel through several cities before he arrived at the checkpoint. BT 329. Approximately 75% of the vehicles passing through the checkpoint are stopped for questioning and approximately 10% to 15% of the vehicles are searched.[9] BT 331, 333. A review of these figures indicates that most of the seized aliens were apprehended while attempting to cross the border. This is true even though only approximately 50% of the men available to Felchlin were stationed on the "line watch." BT 357.

Without actual figures as to how many cars pass through the Highway 86 checkpoint, and how many of these cars are stopped and how many cars are actually searched, it is impossible to accurately determine the

[9]Felchlin was allowed to testify, over objection, that he believed that over half of the vehicles reaching this checkpoint have come directly from Mexicali, B.C., Mexico. No foundation for this "opinion" was established and, in fact, Felchlin admitted there were no statistics available on this point.

effectiveness or reasonableness of the Highway 86 checkpoint. However, in Petitioner's Brief in *Ortiz* it is alleged that 12,000 deportable aliens were apprehended at the San Clemente checkpoint in 1973. Pet. Br. O. 31. In 1973 at San Clemente, 2.3 million vehicles were stopped for brief questioning and 320,000 vehicles were subjected to physical search. BT 28, 31. Using the border patrol's own figures at the San Clemente checkpoint, well over 99% of the time they did *not* find aliens when vehicles were stopped, and over 96% of the time they did *not* find aliens when vehicles were searched.[10] If one assumes that the San Clemente figures are an accurate representation of the entire checkpoint system, it would seem obvious that the stopping and searching of vehicles is not based upon probable cause, whether probable cause is defined traditionally or whether the Government's so called "area equivalent of probable cause" is used. In fact, it would seem that an areawide equivalency of probable cause to believe that the vehicles do *not* contain aliens exists as to at least the San Clemente checkpoint.

The concept of an area functional equivalent for probable cause was developed by the Government to apply *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967), to traffic checkpoint searches for aliens. The Government argues that *Camara, supra*, allows probable cause to be determined on an "area as a whole" rather than upon a "specific dwelling." Pet. Br. O. 19.

[10]These percentages are based on the assumption that there was only one alien found in each searched vehicle. If, in fact, some vehicles contained more than one alien, the percentage of cars stopped and searched without finding aliens would, of course, increase.

Respondent's reliance on *Camara, supra*, to justify the instant search is clearly misplaced. *Camara* and its companion case, *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1731 (1967), dealt with Health and Fire Department inspections. The necessity for these types of inspections on an areawide basis may be provided by the general exterior appearance of the building in the area. Inspections might also be based upon the age of the respective dwelling if some correlation between age of dwelling and disease or fire hazard could be drawn. Thus, in health and fire inspections there exists some exterior criteria which an inspector could point to in trying to establish areawide probable cause to a magistrate to justify the search of a particular dwelling of the area.

This analogy breaks down when it is applied to the traffic checkpoints in the southwestern United States. First, there is no exterior appearance of a vehicle which would reasonably lead a magistrate to determine that it contained aliens. Support for this proposition is found on the previous quoted statistics where over 99% of the vehicles stopped and over 96% of the vehicles searched at San Clemente revealed no illegal aliens. Second, the age of the vehicle certainly has little bearing on whether it will be used to smuggle aliens or not. Third, the high proportion of Mexican-American citizens in the area would not lead a reasonable man to believe that a vehicle driven by a Mexican-American was being driven by an alien. In fact, a determination to stop or search a vehicle solely on the racial characteristics of the driver raises serious equal protection problems. Res. Br. 0. 37.

In *Camara, supra*, the criteria for determining whether "area probable cause" was established as follows:

> "First, such programs have a long history of judicial and public acceptance. (Citation omitted) Second, the public interest demands that all dangerous conditions be prevented or abated, *yet it is doubtful that any other canvassing technique would achieve acceptable results.* Any such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involved a relatively limited invasion of the urban citizen's privacy." (Emphasis added.) 86 S.Ct. at 1735.

Application of these standards to Petitioner Bowen establishes the unreasonableness of the instant stop and search. Under the first criteria mentioned in *Camara, supra, this* court has never sanctioned a checkpoint search away from the functional equivalent of the border. When the second criteria is considered, it is clear that there are numerous other techniques available to prohibit the illegal entry of aliens into the United States. The entire area of the border could be fenced as requested by chief patrol agent Felchlin. BT 370. The "line watch" is not adequate at the present time because of lack of manpower; thus, an increase of manpower, or a reutilization at the border itself of manpower presently stationed inland would result in the apprehension of more aliens. Increase in equipment such as airplanes, radar, star scopes, etc., would increase the effectiveness of a border patrol at the line watch. Third, the removal of the incentive for aliens to illegaly enter the United States by making it a crime for an employee to intentionally employ an illegal alien would perhaps be the best measure of all to curb illegal entry.

Finally, the instant searches are aimed at the discovery of evidence of a crime and they intrude upon an urban citizen's reasonable expectation of privacy. While the alien himself may not be prosecuted unless he is a repeated offender, the driver or "smuggler" operating the vehicle is a subject of prosecution. Border patrol officers are, on occasion, accompanied by other federal officers with other law enforcement duties. I.N.S. agents receive training in the detection of contraband by the United States customs officials. In fact, the I.N.S. checkpoints are provided information about suspected narcotics traffic, bank robbers, murder suspects, etc. BT 375. When agent Felchlin was asked what would happen if a stopped citizen stated that he was a United States citizen but that he did not want to talk to agents any more, Felchlin replied that *this citizen would be referred to a highway patrolman who is generally present at the checkpoint and the patrolman would then check the individual's driver's license and identification, and it is possible that an NCIC "state want" would be "run" on the individual.* BT 383, 384. In fact it is not unusual for border patrolmen to disregard their stated objective of searching for illegal aliens and to search the operators and occupants of vehicles for contraband.[11]

[11] ***United States v. Lujan-Romero***, 469 F.2d 683 (9th Cir. 1972), search of footlocker; ***Valenzuela-Garcia v. United States***, 429 F.2d 1170 (9th Cir. 1970), search of 6-8 inch compartment in car; ***Roa-Rodriguez v. United States***, 410 F.2d 1206 (9th Cir. 1969), search of jacket; ***United States v. Winer***, 294 F. Supp. 731 (W.D. Texas 1969), search under seat of a small automobile; and ***United States v. Hortze***, 179 F.Supp. 913 (S.D. Cal. 1959), search of a package of cigarettes.

Justice Powell, in his concurring opinion in *Almeida-Sanchez, supra*, delineated a four-pronged test to determine whether probable cause existed to stop and search vehicles. This test was ignored by Respondent in its brief for obvious reasons. The test is as follows:

> "(i) The frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) The extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use,[4] and (iv) The probable degree of interference of the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." 93 S.Ct. at 2545. (Footnote omitted)

Without adequate statistics, it is impossible to determine the frequency with which aliens illegally in the country are transported through the checkpoint at Highway 86 or other checkpoints in the El Centro sector. The statistics do indicate that 12,000 aliens were apprehended in 1973 at San Clemente and some 3,825 were taken into custody at *all* checkpoints in the El Centro sector border district, not just the Highway 86 checkpoint. The Highway 86 checkpoint is approximately 36 air miles or 50 land miles from the border. The geographic character of the area is generally desert. However, the checkpoint is north of Interstate 80, the major east-west thoroughfare across the southwestern United States. The checkpoint is also located in such a way that it is passed through by extensive numbers of hunters, dune buggy enthusiasts, fishermen, and vacationers. Finally, the checkpoint is also located *north* of several California cities. Thus, the innocent citizen traveling in the southwest is subject to having his privacy infringed on the whim of I.N.S. agents forcing him to open his trunk and remove his backseat.

The traffic checkpoints are capable of being easily circumvented by alien smugglers. All that an alien smuggler has to do to avoid apprehension at a traffic checkpoint is to stop his vehicle approximately one mile before the checkpoint, unload the aliens and have them sneak by the checkpoint through an overland route, return to the highway past the checkpoint, and be picked up again by the same vehicle. BT 392.

When all the above information is considered, it is obvious that there is not an area equivalent for probable cause at the Highway 86 checkpoint. Without this area equivalent of probable cause, the underlying search is, in fact, invalid whether it is conducted with or without a warrant. For this reason, the Court of Appeals for the Ninth Circuit was correct when it determined that the stop of Mr. Bowen's vehicle and the subsequent search was unconstitutional. *Bowen v. United States, supra*, Part I.

B. Assuming, Arguendo, That There is an Area Equivalence of Probable Cause at the Highway 86 Checkpoint, the Search Conducted at Said Checkpoint Without a Warrant was Invalid.

Respondent next argues that there is no need for a prior judicial determination of the validity of areawide probable cause at the checkpoints and therefore the

warrant requirement of the Fourth Amendment can be dispensed with. This argument flies in the face of all established decisions of this Court and has in fact been rejected by this Court on numerous occasions. *United States v. United States District Court, supra; Katz v. United States, supra; Camara v. Municipal Court, supra.* The reasons for rejecting this position were perhaps best put forth by this Court in *United States v. United States District Court, supra:*

> "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in the domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of 'ordinary crime.' If the thread is too subtle or complex for senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." 92 S.Ct. at 2138.

What the Government is urging, in effect, is that agents of the I.N.S. be permitted to operate checkpoints at locations which they, and only they, deem to be reasonable; during hours which they, and only they, wish to run them; and to conduct searches of vehicles that they, and only they, decide to search. All of this this Court is to accept without *any* predetermined regulations or restraints controlling the conduct of the I.N.S. agent. In fact, during the *Baca* hearings it was admitted that there were no guidelines for the socalled "point man" to determine which vehicles passing through a checkpoint should be allowed to pass, which should be stopped, and which should be searched. BT 381.

Placing this discretion solely in the hands of an I.N.S. agent without any restraint from the Court would be to depart from well established constitutional principles. These principles were articulated in *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367 (1948), in this manner:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[3] Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officer's making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers.[4] . . .No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement." 68 S.Ct. at 369. (Footnotes omitted)

The view that the executive should not be trusted to exercise the judicial function was reiterated in *McDonald v. United States, supra*, where the Court states:

> "We are not dealing with formalities. The presence of the search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate

between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." 69 S.Ct. at 193.

This point was also discussed by this Court in *United States v. United States District Court, supra:*

"Those Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. (Citation omitted) But those charged with this investigation and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their task. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[17]" (Footnote omitted) 92 S.Ct. at 2136, 2137.

The Government argues that the conditions at fixed checkpoints are stable and that the same conditions justifying a search on one day will also apply three days later; therefore, adjudication of Fourth Amendment rights *after* the search will serve to safeguard the privacy protected by the Fourth Amendment. This

argument is falacious in numerous respects. The argument presupposes that in fact the conditions at a checkpoint do not vary from time to time. This conclusion is in direct contradiction to the testimony adduced at the *Baca* hearings. In *Baca*, agent Felchlin testified that certain checkpoints which were temporary in nature would be operated only if information was received that aliens were coming their way. BT 328. Surely, in this situation, the judgment as to whether the checkpoint should be operated and, if it were operated, under what conditions it were to be operated, could just as well be made by a neutral and detached magistrate as by an I.N.S. agent. Next, the *Baca* hearings indicate that during certain periods of the year there are seasonal activities which affect the flow of traffic and which would decrease the possibility of aliens being in each vehicle which passes through the checkpoint. Primarily these activities include hunting and fishing season, winter recreational vehicles, and vacation travel. BT 388. It is inconceivable that a magistrate would not take these seasonal variations in traffic into account when he determined whether a warrant would be issued. One of the primary reasons aliens illegally enter the United States is to find employment to improve their standard of living. A great deal of the employment obtained by the illegal alien is the harvesting of field produce. It would certainly bear on a magistrate's determination as to whether a warrant should be issued for a checkpoint if harvesting season was or was not in session and whether there was a great demand for field hands.

Another important factor to determine whether highway checkpoints should be authorized to operate under warrant would be the weather conditions in the

immediate area. If the statistics show that aliens illegally entered the United States on a much larger scale when there was no moon, it might be reasonable to authorize checkpoint stops during the period of the dark of the moon and not at other times; it could also be determined whether a checkpoint should be opened or not during inclement weather.

Finally, if information were received that numerous aliens had penetrated the "line watch" and there was information to indicate that they were attempting to travel toward the interior of the United States, it might be an appropriate time for a magistrate to issue an order allowing a search at this time. It should be obvious from the foregoing that there are numerous instances when a magistrate's discretion could be brought into play to allow checkpoints to be operated at some times for some purposes while at other times the checkpoint would not be allowed to operate.

Not only are there numerous factors which should be considered as to whether a traffic checkpoint should be operating, but there are other factors to determine the scope of the inquiry or search which would be permitted at the checkpoint. It may well be that it would be reasonable for a magistrate to issue a warrant allowing a vehicle to be stopped for a quick exterior inspection but not to *carte blanche* allow searches of the vehicles. A search might then be authorized if, and only if, the officer could articulate reasons amounting to probable cause to believe that that particular vehicle contained illegal aliens. If, on the other hand, previous information had been obtained particularly describing certain vehicles with license plate numbers, etc., it may well be that a warrant could be issued to authorize the

stop and search of that vehicle. In any event, it would seem that a judicial officer would be better qualified to render this judicial decision than an immigration officer.

Another factor to be determined by the magistrate would be the physical location of the traffic checkpoints. At the present time checkpoints are located in positions which reflect the unfettered judgment of the I.N.S. that they are needed at the specific location. This determination flies in the face of the recent pronouncement of this Court in *Almeida-Sanchez v. United States, supra*, that searches such as the instant search are to be conducted at the functional equivalent of the border so that the vehicles searched for illegal aliens have a high probability of coming from the international border. Unless a checkpoint is located at the functional equivalent of the border a stop and search of the vehicle should be unconstitutional. This is particularly true when examining the checkpoint on Highway 86 because it is north of Interstate 8, the major east-west thoroughfare in the southwest. It is also located north of several California cities in the immediate area. For this reason it is clear that much traffic which is not "Border traffic" passes through this checkpoint.

Respondent's contention that a subsequent judicial hearing in the nature of a motion to suppress evidence in any criminal proceedings would be adequate to remedy the violation of the Fourth Amendment rights completely ignores the plight of the innocent motorist traveling across the southwestern United States on Interstate 80, who swings north on Highway 86, and is subjected to a vehicle search by an I.N.S. agent, without probable cause and without a warrant, and who finds nothing. This citizen has been delayed in his

journey, subjected to the degradation of being treated like a "common criminal" and he has little, if any, redress for the invasion of his privacy. Further, he has no meaningful way of knowing if the agent is operating under lawful authority or merely at his (the agent's) whim. This situation is not an unusual situation in light of the fact that over 99% of the stops at San Clemente produce no aliens and over 96% of the searches at San Clemente produce no aliens. It is exactly this situation which requires the insertion of the magistrate between the unfettered discretion of the officer in the field. This process of allowing subsequent authorization for searches or arrests was strongly criticized in *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223 (1964), where the Court stated:

> "An arrest without a warrant bypasses the safeguards provided by an objective pre-determination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." 85 S.Ct. at 228.

A careful reading of Respondent's brief indicates that their main reason for circumventing the judicial process in the determination of whether a search can take place is for the convenience of law enforcement. It was readily admitted by agent Felchlin, during the *Baca* hearing, that his agency would be much more effective if he were allocated 50 more men; if he had a 12-foot fence along the 75 miles of border section; if he was equipped with radar, and if he had better equipment for night watching. In effect, the Government in this case contends that because law enforcement could use

more personnel and technology, and this is not forthcoming, Fourth Amendment protections should be abridged in the name of law enforcement. This has never been a reason for abrogating the Fourth Amendment. In fact, this Court, itself, recognized this in *Almeida-Sanchez v. United States, supra*, where it stated:

> "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 93 S.Ct. at 2540.

It is precisely for these reasons that, if this Court finds there is an areawide equivalency of probable cause to justify the traffic checkpoints, this Court should further require the protection of a warrant to properly curtail the discretion of I.N.S. agents in stopping and/or searching vehicles.

III.

JOHN LEE BOWEN SHOULD HAVE BEEN GIVEN THE BENEFIT OF THE DECISION IN *UNITED STATES V. BOWEN*, PART I.

Petitioner Bowen contends that this Court's decision in *Almeida-Sanchez, supra*, and the *en banc* decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Bowen, supra*, Part I, were clearly foreshadowed by previous decisions of this Court and, for this reason, the question of retroactivity does not arise and Petitioner Bowen himself is entitled

to the benefit of the existing case law. Pet. Br. 6-12. In deciding *Almeida-Sanchez v. United States, supra*, this Court concluded that *no* prior decision of this Court supported the Government's position in that case. The Government now argues that the Federal Courts of Appeal can disregard established law from the Supreme Court and through this course of conduct, establish a body of law justifying clearly unconstitutional conduct. In support of this premise, the Government argues that this Court did not grant certiorari to review these decisions of the Court of Appeals allowing alien checkpoint searches. Pet. Br. O. 48-49. In this regard, Respondent overlooks the established principle that denial of certiorari by the Supreme Court reflects no opinion on the merits of the underlying actions. *United States v. Kras*, 93 S.Ct. 631, 409 U.S. 434 (1973); *Griffin v. United States*, 69 S.Ct. 814, 336 U.S. 704 (1949).

Of necessity, Respondent relies upon the opinions of the Ninth Circuit Court of Appeals justifying traffic checkpoint searches which were clearly abhorrent to the Fourth Amendment. Pet. Br. O. 48. In attempting to justify this reliance, Respondent cites *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). In *Huson*, the injured party filed a personal injury action against Chevron Oil Co. over one year after the date of the actual injury. At the time that the suit was filed, the suit was timely because it was felt that admiralty law, governed by the principle of laches, controlled the filing of the suit rather than Louisiana's one year statute of limitation. After the filing of the suit, this Court decided *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969). *Rodrigue, supra*,

dealt with the interpretation of Title 43 U.S.C. §1331, et seq. There were no prior Supreme Court decisions in this area to aid the lower courts in the statutory construction of this Act and therefore the Courts of Appeal necessarily rendered their decision of first impression without guidance from the Supreme Court. Taking this into consideration, the Court in *Huson, supra*, refused to make the rule of *Rodrigue, supra*, retroactive. This is an entirely different situation from the instant case. Here, the I.N.S. relies upon their own administrative regulation, Title 8 C.F.R. §287.1(a)(2), to justify alien searches at checkpoints concededly away from the functional equivalent of the border. Previous Supreme Court interpretations of administrative regulations have indicated that at the very least area probable cause and a warrant are required in this situation. *Camara v. Municipal Court, supra; See v. City of Seattle, supra.* There is also a long line of case law governing the search of moving automobiles which establishes that "particular" probable cause is required before a search is justified. In this instance, the Court of Appeals rejected established Supreme Court law in upholding the administrative regulations and Title 8 U.S.C. §1357. Thus, *Huson, supra*, is inapplicable to the instant situation.

Respondent agrees with Petitioner Bowen's contention that if *United States v. Bowen, supra*, Part I established "new law", Petitioner Bowen himself should get the benefit of this rule. However, Respondent bases this concession on policy reasons. While Mr. Bowen accepts this concession, he still believes that Article III, Section 2 of the Constitution dictates this result. As was said in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969):

> "[B]ut, as we recently explained in *Stovall v. Denno*, 388 U.S. 293, 301, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, the fact that the parties involved in the decision are the only litigants so situated who receive the benefit of the new rule is 'an unavoidable consequence of the necessity that constitutional adjudications do not stand as mere dictum.' Whatever inequity may arguably result from applying the new rule to those 'chance beneficiaries' is 'an insignificant cost for adherence to sound principles of decision-making.' " 89 S.Ct. 1036 n. 24.

Respondent's reliance upon *Allen v. State Board of Education*, 393 U.S. 573, 89 S.Ct. 817 (1969); *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461 (1964); and *James v. United States*, 366 U.S. 213, 81 S.Ct. 1052 (1961) is misplaced in that these decisions do not involve "constitutional adjudications." *Allen supra*, involved the interpretation of Title 42, U.S.C. §1973, et seq.; *England, supra*, involved the proper procedure to obtain a state decision of a federal claim; and *James, supra*, involved the statutory interpretation of Title 26, U.S.C. §145(b) and 7201. *United States v. Bowen*, Part I, involves "constitutional adjudication" as did *Desist, supra*, and *Stovall, supra.*[12]

Finally, assuming that *Almeida-Sanchez, supra*, made new law, Respondent contends that Petitioner Bowen should not get the benefit of the holding even though Mr. Bowen was on "direct appeal" at the time of this decision because of "policy reasons." Petitioner contends that in fact policy reasons require that *Almeida-Sanchez, supra*, be applied to him. Pet. Br. 20-26.

[12] *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966) and *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), indicating a contrary view was overruled by implication in *Desist, supra*, and *Stovall, supra.*

In Support of this position, Respondent relies upon *Michigan v. Payne*, 412 U.S. 47, 93 S.Ct. 1966 (1973); *Adams v. Illinois*, 405 U.S. 278, 92 S.Ct. 916 (1972); *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148 (1971); *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093 (1968); and *Desist v. United States, supra*. All of these cases involve constitutional adjudications affecting local, state, and federal law enforcement and all those constitutional principles if applied retroactively, would cause a massive burden on local, state and federal courts.[13]

Petitioner's cause, on the other hand, involves a decision that generally only affects a few Federal Courts in the Fifth, Ninth and Tenth Circuits, and only one small federal law enforcement agency, the I.N.S. The effects of applying *Almeida-Sanchez, supra* to cases on direct appeal at the time of that decision on law enforcement and the courts would be minimal compared to the effect of making the decisions in *Payne, supra; Adams, supra; Williams, supra; DeStefano, supra,* and *Desist, supra*, retroactive.

[13] *Payne, supra,* involved the retroactivity of the decision prohibiting increased sentence on retrial; *Adams, supra*, involved the retroactivity of required counsel at preliminary hearings; *Williams, supra*, involved the retroactivity of the scope of searches incident to arrest; *DeStefano, supra*, involved retroactivity of jury trials for certain offenses; and *Desist, supra* involved retroactivity of warrantless wiretaps.

CONCLUSION

Petitioner John Lee Bowen submits that the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Bowen*, Part I, was correct when it determined that a warrantless, probable causeless search of his vehicle at a fixed checkpoint not the functional equivalent of a border violated the Fourth Amendment to the United States Constitution. It is clear that this opinion of the Court of Appeals should have been applied to Petitioner Bowen himself because that decision either (1) was clearly foreshadowed by previous decisions of this Honorable Court; or (2) the decision of the Ninth Circuit overruled clear past precedents of that Circuit and therefore the opinion announced in *United States v. Bowen, supra*, was new law and Mr. Bowen himself should be given the benefit of that ruling. For this reason, the contraband seized from Mr. Bowen's camper must be suppressed from evidence and the matter remanded to the United States District Court for the Sourthern District of California to determine whether there is enough admissible evidence to proceed to trial against Mr. Bowen. Any other result would work an injustice upon Mr. Bowen who has continually

challenged the validity of the search and the admissibility of the seized contraband into evidence which was used to convict him.

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Respectfully submitted,

MICHAEL D. NASATIR, of
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, #510
Beverly Hills, Ca 90211
(213) 653-3303

JERALD W. NEWTON, of
Newton, Re & Russell
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 655-5011

Attorneys for Petitioner

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OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AMICUS CURIAE OF GILBERT BRYANT FOERSTER

ARTHUR WELLS, JR.,
125 Twelfth Street,
Suite 110,
Oakland, California 94607,
Telephone: (415) 763-4433,
Attorney for Amicus Curiae.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AMICUS CURIAE OF GILBERT BRYANT FOERSTER

BASIS FOR FILING AND INTEREST OF AMICUS CURIAE

Amicus Gilbert Bryant Foerster has requested and received written consent to the filing of this Brief *Amicus Curiae* from both counsel for Petitioner Bowen and the Solicitor General on behalf of the United States. Filing of the Brief is thus premised on the consent of all parties pursuant to Rule 42(2) of this Court. The original written consents of the parties have been filed with the Court; copies are set forth in Appendix A.

Amicus Foerster has a Petition for Writ of Certiorari pending in this Court, No. 73-1856, seeking review of his conviction for violation of Title 21 U.S.C.

§176a. The conviction was based on evidence found as the result of a search of a private vehicle on May 1, 1970, without cause or founded suspicion, which took place at a permanent immigration checkpoint located seventy miles north of the Mexican border on a major interstate highway running between San Diego and Los Angeles, two large metropolitan United States cities. The checkpoint in question has been held not to be functional equivalent of a border, *U.S. v. Morgan,* No. 73-1669 (CA 9, 6-14-74).

A previous Petition for Certiorari filed by *Amicus Foerster* was granted and his conviction was vacated for reconsideration in light of *Almeida-Sanchez v. U.S.,* 413 U.S. 266, *Foerster v. U.S.,* 413 U.S. 915. Upon reconsideration the Ninth Circuit affirmed *Amicus Foerster's* conviction on the basis of *Bowen,* the case under consideration, which held that the doctrine of *Almeida-Sanchez* applied to permanent checkpoint searches, but which limited relief to searches occurring after June 21, 1973.

Thus, *Amicus Foerster's* case raises the same issue as *Bowen,* namely, what standards govern immigration searches at permanent checkpoints. Because the search of *Amicus* occurred at a checkpoint which may possess characteristics different from those in *Bowen,* which characteristics may affect decisions as to the reasonableness of the two searches, consideration of *Amicus Foerster's* case will help decide the issues before the Court.

Amicus is aware that certiorari has been granted not only in *Bowen,* but in *U.S. v. Ortiz,* No. 73-2050 and

U.S. v. Brignoni-Ponce, No. 74-114. In each of these cases, the Government will be asserting that this Court's retroactivity doctrine should limit the application of the Fourth Amendment principles applied in *Almeida-Sanchez* and apparently applicable in *Bowen. Amicus* wishes to advise this Court as to why no retroactivity issue is properly present, and to call to the Court's attention the undesirable consequences which would flow from a misapplication of that doctrine.

SUMMARY OF ARGUMENT

The *Bowen* case, and that of *Amicus Foerster,* require that this Court determine whether particular searches meet the Fourth Amendment's standard of reasonableness. Because these searches occurred at permanent immigration checkpoints, and because the Government claims that normal Fourth Amendment rules should not apply at such checkpoints, it is necessary to examine such checkpoints and the Government's behavior at them.

I

An examination of the nature and function of permanent checkpoints, the Government's behavior at them, the Government's needs, and the invasions of privacy of citizen travelers occurring at such checkpoints shows that permanent checkpoint searches are not *per se* reasonable. When such checkpoints are not at the border or its functional equivalent, cause must be required to justify a search. If the checkpoint is

within a zone which is a reasonable distance from the border (the zone being variable depending on conditions), then an appropriate resolution of the co-equal and competing constitutional interests would be to permit stops and brief interrogations without cause, but to require cause for a *search.* Depending on conditions, a founded suspicion might constitute sufficient cause to justify a search.

In any event, the search of *Amicus Foerster* was not reasonable.

II

There is no justification for failing to apply the normal Fourth Amendment standards which were applied in *Almeida-Sanchez v. U.S.,* 413 U.S. 266, and which should be applied in *Bowen,* to all cases presently on direct review. *Almeida-Sanchez* did not, and the decision in *Bowen* need not, enunciate a new constitutional rule, overrule any past case of this Court, or make a sharp break with the past. The doctrinal basis of *Almeida-Sanchez* shows no more than the usual application of Fourth Amendment principles; the result therein was clearly foreshadowed by numerous decisions of this Court. The disposition of *Bowen* and of *Foerster* should be governed by similar doctrine. There is thus no justification for any application of this Court's retroactivity doctrine.

Any limitation of *Almeida-Sanchez* or *Bowen* to prospective application will adversely affect this Court's reputation for principled adjudication.

ARGUMENT

I

A SEARCH FOR ALIENS AT A PERMANENT VEHICULAR CHECKPOINT WHICH IS NEITHER AT THE BORDER NOR ITS FUNCTIONAL EQUIVALENT IS NOT PER SE REASONABLE AND THEREFORE MUST BE BASED UPON CAUSE TO BE CONSTITUTIONAL.

A.

The legality of every search case turns on its own facts. No ready talisman signals whether a search is reasonable, but this does not mean that the issue is to be decided by the proclivities of the Justices on the Court. Instead, the Court must develop criteria for evaluating the reasonableness of each search by examination of the factual setting of the search considered.

The search at bar, as well as that of *Amicus Foerster,* occurred at a permanent immigration checkpoint. As the government appears to claim that searches at such locations should be immune from the normal Fourth Amendment standards, it is necessary to investigate the setting of such searches.

1. The Government has set up permanent checkpoints in alleged pursuance of its obligation to detect the presence of illegal aliens within the Country. At these checkpoints travelers are stopped and interrogated and their vehicles searched.

2. Not all vehicles passing through the checkpoints are stopped, and not all stopped vehicles are searched.

Bowen v. U.S., ... F.2d .....; Petition for Certiorari of *Amicus Foerster,* p. 8.[1] The Government has never advanced a rational policy governing which vehicles are to be searched. Such policy as apparently governs permanent checkpoint searches was stated in *Amicus'* case as follows:

> Well, our *formal policy,* of course, being close to the international boundary, our past apprehension reports show about 90% of our apprehensions come from Mexican-Americans or Mexican aliens. We pull these people predominantly over. We pull U-haul trucks. We cannot see inside—almost any vehicle that comes through that we cannot observe on the inside as a matter of policy, automatically pull those over.
>
> Vehicles that have the back end unusually low to the ground, indicating an unnecessary or unusual amount of weight in the trunk are often times suspect. Then it is a kind of undefinable thing except based on experience. You have been in the business a long time and some people look a little bit different to you, and they are worth a check, or they may not be, but they may be. So I say it is based a lot on experience and a great deal on what we are looking for. (16-17) (emphasis added) Cert. Pet., pp. 8-9.

There appears not doubt but that the decision to search is based primarily on the predisposition of the officer on duty, and is therefore most often arbitrary.

3. The permanent checkpoint immigration search entails a substantial invasion of the privacy of the

[1]Hereinafter "Cert. Pet."

citizen traveler. Everyone has an expectation of privacy in his automobile, which is often used to carry private and personal possessions, and is fitted with locks to enforce the privacy. The privacy expectation at least equals that within a telephone booth, cf. *Katz v. U.S.,* 389 U.S. 347. United States citizens have little or no expectation of police behavior which is arbitrary or without cause. Further, citizens have no expectation of being searched during domestic travel.

But the impact of a checkpoint search is more than that of an unexpected arbitrary search. Because not everyone, or even a majority of people, are subjected to search, the selected traveler feels the pressures of being subject to close governmental scrutiny. And because he assumes other people think the way he does, he feels belittled and embarrassed because he believes that other persons traveling through the checkpoint, not subjected to search, think that he has been pulled over and searched for some good cause.

The formidable psychological impact of the search is reinforced by its setting. The search occurs on or near the open highway and is often conducted at night, circumstances which lead the traveler to feel insecure and exposed. The traveler is inevitably where he cannot secure witnesses or aid from family or friends, and, probably in most cases, is a long distance from the geographical area most familiar to him.

The permanent checkpoint search is thus significantly different from the house search of *Camara v. Municipal Court,* 387 U.S. 523, where all dwellings

in a given area are subject to inspection and where inspection takes place away from the eyes of strangers.

There is no evidence that the searches are conducted in a polite, non-aggressive manner, if possible. There is no evidence that the detention period occasioned by any search is short. There is no evidence that the reason for the search is explained to the traveler, although it could hardly provide solace to a traveler to find that the government wishes to conduct a search to determine if he is an alien smuggler, or, in other words, a criminal.[2]

4. The government has never made a factual showing that searches without cause are necessary to produce any significant result in terms of apprehending aliens. While the government produces statistics on the number of illegal aliens detected, we are not told how many aliens are caught as the result of stops and interrogations, without search. More importantly, we are not told how many of the searches which produced aliens were in fact based on some cause such as a reasonable suspicion. Examination of the cases before the circuit courts indicates that cause often develops rapidly after a stop and detention.[3]

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[2]Immigration searches are not administrative. Officers are seeking to identify smugglers. A pure administrative search would be one for people with smallpox, who will not be arrested because of the disease. Cf. *Robinson v. California*, 370 U.S. 660.

[3]*Fernandez v. U.S.*, 321 F.2d 283 (9th Cir. 1963); *Renteria-Medina v. U.S.*, 346 F.2d 853 (9th Cir. 165); *U.S. v. Avery*, 428 F.2d 1159 (9th Cir.) *Cert. denied*, 400 U.S. 903; *Duprey v. U.S.*, 435 F.2d 1276 (9th Cir. 1970); *U.S. v. Aranda*, 457 F.2d 761 (9th Cir. 1972); *Roberts v. U.S.*, 470 F.2d 858 (9th Cir. 1972); *U.S. v. Campos*, 471 F.2d 296 (9th Cir. 1972); *U.S. v. Barrow*, 472 F.2d 1215 (9th Cir.), *cert. denied*, 413 U.S. 920 (1973); *U.S. v. Anderson*, 468 F.2d 1280 (10th Cir. 1972); *U.S. v. McCormick*, 468 F.2d 68 (10th Cir. 1972).

The evidence in *Amicus Foerster's* case was that seventy-five percent of the aliens apprehended at the checkpoint in question were found through conversations with vehicle occupants. Of the twenty-five percent found through searches, the government failed to indicate if the searches were with or without cause. Cert. Pet., p. 8.

5. No showing has ever been made that the immigration system would not function just as well if the government established permanent checkpoints which were at locations away from the border, but where the probability of a nexus with international travel was high. Under present circumstances, no showing has ever been made that any non-border permanent checkpoint has a strategic location insuring a high probability that it focuses primarily upon international travel.

6. Permanent checkpoints have less justification for their existence than roving stops. Permanent checkpoints interfere with the lives of many more persons than roving stops. Yet fixed locations are the least efficient method for catching violators, for if the criminal knows he may be searched at a specific location, he will avoid it. In other words, the element of surprise present in the roving patrol is missing.

Amicus is unacquainted with the statistics of the checkpoint in *Bowen,* but the California State Highway Department statistics show that in 1970, the year of *Amicus'* arrest, close to eight million vehicles went through the checkpoint at which *Amicus* was searched. (In 1973, the number had increased to over 9.8 million). Testimony of immigration officials in *Amicus'*

case as to the number of vehicles searched varied; the testimony indicated that not less than one-half million and perhaps up to two million cars were searched annually at this checkpoint alone. See Cert. Pet., pp. 7-8. The searches netted approximately 2,100 aliens for the year. *Id.* Again, we do not know how many of the searches which resulted in alien apprehension were with cause.

7. The government has never made a factual demonstration that its problems regarding immigration law enforcement differ significantly from enforcement problems involving other laws such as narcotics, gambling, or organized crime. The government's obligation to prevent narcotics distribution is at least equal to that of its immigration functions. If federal narcotics agents can live with a cause requirement, certainly if the Bureau of customs can, see *U.S. v. Johnson,* 425 F.2d 630, *cert. grtd.* 400 U.S. 900, dismissed under Rule 60(2) on motion of United States, then immigration officers should be able to.

The above discussion demonstrates that searches at permanent checkpoints are not *per se* reasonable, at least where such checkpoints are not at a border or its functional equivalent. It then becomes necessary to determine when searches at non-border checkpoints will be reasonable.

B.

> We are confronted here with the all too familiar necessity of reconciling a legitimate need of government with constitutionally protected rights. There can be no question as to the seriousness and legitimacy of the law enforcement problem with respect to enforcing along thousands of miles of open border valid immigration and related laws. Nor can there be any question as to the necessity, in our free society, of safeguarding persons against searches and seizures proscribed by the Fourth Amendment. *Almeida-Sanchez v. U.S., supra,* at 275, (Powell, J. concurring).

Government often has a legitimate need to search. The normal reconciliation of the needs of government and the rights of citizens in the Fourth Amendment area is accomplished by requiring the government to demonstrate that it has "probable cause." When government can demonstrate that it has reasonably trustworthy information about facts and circumstances which are "sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed," *Berger v. New York,* 388 U.S. 41, its needs are deemed strong enough to override a citizen's privacy rights.

This Court has always held that any relaxation of normal Fourth Amendment standards must be premised on a governmental showing that exigencies of the situation make the government's course *imperative, Coolidge v. New Hampshire,* 403 U.S. 443. Thus, in *Camara v. Municipal Court, supra,* this Court softened the focus normally required for probable cause because enforcement of the housing laws was impossible otherwise. In *Terry v. Ohio,* 392 U.S. 1, this Court permitted police officers a limited invasion of citizen's privacy rights because there was no other reasonable means of affording personal protection to the officers.

Here, the government has some needs relative to the enforcement of its immigation laws. Necessity is, of course, never a justification for the suspension of Fourth Amendment rights. Justifiable and provable needs may, however, affect the balance to be struck between competing interests. The government can already conduct stops, interrogations and full searches without cause at the border or its functional equivalents. *Almeida-Sanchez v. U.S., supra.* (The government is not limited to borders and airports, for the functional equivalence test certainly encompasses the notion of a flexible zone away from the border, the notion suggested by the minority in *Almeida-Sanchez.* The zone might be quite narrow in California, but quite broad in parts of Texas or Alaska.)

What the government apparently needs the most is to be able to stop travelers and talk to them within reasonable distances from the border. Such evidence as is available indicates, and logic supports, the proposition that most of the effective enforcement comes from use of this tool. There is admittedly a possibility that the government's function will be impaired without the ability to stop and talk to travelers without cause.

As the intrusion on privacy of a mere stop is significantly less than that of a search, it appears that the government should be given this right. The right should be limited to a reasonable distance from the border, which will depend upon circumstances, such as those propounded by Justice Powell in reference to his area warrant notion in *Almeida-Sanchez.* See 413 U.S. 283-4.

Cause should be required for an alien search away from the border because of the serious invasion of privacy of domestic travelers, because the government has not demonstrated any need for a no-cause search right to enforce its laws, and because officers should be held accountable for their behavior if they invade the rights of domestic travelers. Where factors indicate such a course is reasonable, searches may be permitted on a reasonable suspicion supported by articulable facts. This would permit a search, for example, upon an informer's tip or where a car was riding excessively low.

The claim of the government to total search authority, to be exercised thousands of times a day, with no requirement that it justify its actions either before or after the search, is wholly unwarranted. All the government needs, and all it should be permitted is "an escalating set of flexible responses, graduated in relation to the amount of information [it] possess[es]" *Terry v. Ohio, supra,* at 10. The procedure outlined by *Amicus* gives the government the measured response it needs to present day immigration problems.

C.

The facts of *Amicus'* case provide clear focus on why no-cause searches at checkpoints away from the border are not *per se* reasonable. After *Amicus* was stopped at a permanent checkpoint, the official conducting the investigation determined that he and his passenger were United States citizens. The official testified that there was nothing unusual about *Amicus'* vehicle at the time it was pulled over and searched,

there was no reason to believe that either the vehicle or its occupants had ever been outside the United States, and there was no reason to believe that the vehicle contained aliens or contraband. Pet. Cert., p. 10. Thus, the official possessed no facts about *Amicus* or his vehicle which would warrant a belief or raise a suspicion that an offense was being committed.

The place where *Amicus* was searched was seventy miles north of the Mexican border, on a highway on which millions of cars travel annually. The check point is between Los Angeles (the largest city in California and the second largest metropolitan area in the United States) and San Diego (one of the four largest cities in California and a major business and tourist center for the southern part of the state.) See Pet. Cert., p. 7, fn. 5 for further details on these two cities. In addition, between San Diego and the checkpoint are at least ten state beaches and resort towns. *Id.*

Under the circumstances, then, officials had no reason to believe that all, most, or even a high percentage of vehicles going through the checkpoint had recently, or ever, crossed the border. The road is obviously a major domestic artery for vehicular traffic; the checkpoint is far from the border; and the record in *Amicus'* case shows that the concentration of illegal alien traffic in relation to general traffic on the road is very small. Pet. Cert., pp. 7-8.

Thus, the location of the checkpoint discloses no basis on which one could conclude that it would be reasonable to conduct any kind of alien search, much

less one without cause. Understandably, the location has been found not to be the functional equivalent of a border. *U.S. v. Morgan, supra.*

In summary, the government has nothing to put on the scales to balance against the interference with *Amicus'* Fourth Amendment rights.

II

THERE IS NO JUSTIFICATION FOR FAILING TO APPLY THE NORMAL FOURTH AMENDMENT STANDARDS WHICH WERE REITERATED IN ALMEIDA-SANCHEZ v. U.S., AND WHICH SHOULD GOVERN BOWEN v. U.S., TO ALL CASES PRESENTLY ON DIRECT APPEAL.

Introduction

The government is presently arguing that this Court's treatment of non-border searches for aliens should be limited to prospective application. Such an argument can only be premised on the conclusion that *Almeida-Sanchez* has, and *Bowen* will, set forth a new constitutional rule.[4] That conclusion is in error.

A.

In *Almeida-Sanches,* this Court was faced with the question of the legality of a search which took place without probable cause or a reasonable suspicion. This Court did no more than hold that normal Fourth Amendment standards of cause applied to that search. Even the minority treated the case as one in

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[4] *Gosa v. Mayden,* 413 U.S. 665; *Chevron Oil Co. v. Huson,* 404 U.S. 97; *Milton v. Wainwright,* 407 U.S. 371, 381 fn. 2 (Stewart, J., dissenting); *Michigan v. Payne,* 412 U.S. 47; *Williams v. U.S.,* 401 U.S. 97.

which the question was solely that of the reasonableness of the search.

No new doctrine was enunciated by the Court and applied to the search to find it illegal. The majority held the search illegal because *on the facts of the case* no justification was shown for the search; the minority disagreed solely because it felt that "under all the circumstances the stop of petitioner's car was reasonable . . .", *Almeida-Sanchez* at 299, 288-9. That the dispute between the majority and the minority was solely upon the construction of the facts is evident from the fact that even the minority was careful to point out that it was not stating that all searches for aliens pursuant to authority claimed by the government were necessarily legal, *Id.* at 299, fn. 11.

The only "new" proposition in *Almeida-Sanchez* was the assertion by the government that it had a right to search without any reason whatsoever anywhere within one hundred miles of any border, irrespective of geographical, demographic or other characteristics of the place of the search. The rejection of this "extravagant license" which was warranted by neither an enactment of Congress nor any case of this Court, certainly could not be deemed to create a new constitutional principle.

All *Almeida-Sanchez* said in response to the government's broad claims is that it could continue to search without cause at the border or any other place which was very, very much like a border, i.e., its functional equivalent. Otherwise, the government's searches must be premised upon cause.

The fact that the Court permitted searches without cause at the functional equivalent of a border in addition to the border itself did not create a "new" rule; the granting of such search permission was no more than the application of common sense. More to the point, the validation of searches at functional equivalents enlarged the area of search permitted the government; it did not create or enlarge any rights for citizen travelers.

In *Bowen,* and in the case of *Amicus Foerster,* this Court need not announce any new constitutional rule. It need only decide if the searches which took place were reasonable, using, just as in *Almeida-Sanchez,* doctrines which have previously been formulated and applied by the Court. Claims by the government that the rejection of its past practice creates a new rule which should not be applied to cases presently before this and other Courts are fictitious, and should be rejected.

B.

The decision in *Almeida-Sanchez* did not, and the decision in *Bowen* need not, overrule clear past precedent or make a sharp break with the past. The holding of *Almeida-Sanchez* was, and the correct result in *Bowen* is, clearly foreshadowed by a wide range of cases of this Court.

This Court has *never* permitted the government to search members of the general public engaged in domestic activity without cause. Fifty years ago the government sought such authority, but this Court in

Carroll v. United States, 267 U.S. 132, clearly and forthrightly refused to grant that authority. No case has since inhibited the vitality of *Carroll.* Moreover, *Carroll* has been followed in *Brinegar v. U. S.,* 338 U.S. 160; *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216; *Chambers v. Maroney,* 339 U.S. 42, *Husty v. United States,* 282 U.S. 694 and *Scher v. U. S.,* 338 U.S. 160. Even a cursory reading of *Carroll* by the government must have provided it with notice that its overly broad search claims were without merit.

Broad search authority was again sought in *Camara v. Municipal Court, supra* and in *Terry v. Ohio, supra.* Despite the demonstrated needs of the government presented in those cases, this Court required some cause for a search. Here, of course, need has not even been demonstrated.

Cases dealing with domestic automobile searches while not requiring a warrant in all circumstances, have never dispensed with the cause requirement, so as to give the government wholesale search authority for which it need never account. *See Chambers v. Maroney, supra*; *see Coolidge v. New Hampshire,* 403 U.S. 443.

As the Court in *Almeida-Sanchez* noted, no cases of this Court support the government's position. All of the cases have indicated that cause is required in the circumstances and thus have foreshadowed the results which have and should obtain in these search cases.

C.

It is also noteworthy that this Court in deciding *Almeida-Sanchez* did not find the search statute unconstitutional, did not have to place a strained construction upon it, and did not have to place a limiting gloss on its text. 8 USC §1357 provides for vehicle searches for aliens without warrant. Without this statute, it is doubtful if immigration officers could search at all. In other words, it is primarily an *enabling* statute.

The statute provides for *warrantless* searches of automobiles within a reasonable distance from the border. It does not provide for searches without cause.[5] The statute does represent the judgment of Congress that a warrant requirement would seriously impede the enforcement of the immigration laws. Expression of such a legislative judgment, while not final, *Marbury v. Madison,* 1 Cranch 137, seems particularly appropriate with respect to the question of whether a warrant is needed for an automobile search, for that problem has plagued this Court from *Carroll* through *Coolidge.*

But the statute says nothing about the factual basis to be required for an immigration search. This is a question separate and apart from whether a warrant shall be required. It is evident that when Congress wishes to permit searches without cause, it does so specifically and clearly. *Compare* 8 U.S.C. §1357 *with*

[5]In this regard, *Amicus* respectfully but strongly disagrees with the minority's view in *Almeida-Sanchez* but it was the judgment of Congress that searches without probable cause were proper. *Id.* at 294.

18 U.S.C. § 923(g) construed in *U.S. v. Biswell,* 406 U.S. 311 *and* 26 U.S.C. §§ 5146(b), 7606 construed in *Colonnade Catering Corp. v. U.S.,* 397 U.S. 72. The statute in question which enables immigration officials to search does not speak to the basis to be required for searches; it is difficult to perceive how the government can claim that a statutory judgment which never existed has now been radically changed.

While the government's own regulations could not control the disposition of the issues at bar, it is significant that no regulations have been passed governing the factual basis required for alien searches. 8 C.F.R. § 287.1. Failure to pass such regulations strongly indicates that, at one time, the Attorney General read the statute the same way *Amicus* now reads it: no such regulations were passed because Congress did not legislate concerning the basis for immigration searches.

D.

The above argument should amply demonstrate that no issue of "retroactivity" is presented by *Bowen,* or by the case of *Amicus Foerster,* for this Court need do no more than it did in *Almeida-Sanchez*: apply long-standing Fourth Amendment principles to the facts of the cases before it.

Yet the government is arguing that such application would be "retroactive" based on its assertion that lower Federal Court law controls the question of retroactivity, and its further assertion that the Ninth Circuit has had a long standing rule permitting immigration searches without any cause requirement. Neither assertion has merit.

1. The government, in seeking to limit the application of Fourth Amendment principles to immigration searches, is squarely placing in issue the question of which Court is to finally decide how our constitutional principles are to be applied. By arguing that this Court is limited in its application of Fourth Amendment doctrine by the legally incorrect posture formerly taken by a subordinate federal court, the government is asking this Court to withdraw from its position as the ultimate authority regarding and final arbiter of the application of constitutional doctrine.

The searches herein present questions which arise solely in a federal context. Thus, there is no need to consider here a possible disruptive impact upon basic notions of federalism. This Court through its decisions must be the sole source for guidance upon questions of basic constitutional principle. Such a course is clearly appropriate where the lower federal court cases on which reliance is claimed were not based upon *Carroll v. U. S., supra,* nor any of its heretofore cited judicial kin.

2. A review of the lower federal court immigration cases shows that no long standing clear rule which permitted immigration searches without any cause whatsoever existed upon which the government can claim reliance. Rather, a rule requiring searches at non-border locations to be based on cause has long existed, and a brief and recent deviation therefrom has been promptly corrected by this Court.

a. The first case clearly dealing with a stop, interrogation and search for immigration purposes appears to have come before the Ninth Circuit in 1961, *Con-*

treras v. U.S., 291 F.2d 63 (9th Cir. 1961). In that case, an alien was stopped for a routine identity check at a *permanent* checkpoint 72 miles north of the Mexican border. The court held that the initial stop and interrogation were legal without the existence of probable cause. It then addressed itself to the legality of the search. It clearly rejected the argument that the search was a border search:

> We cannot believe that the search can be sustained as a border search. The search was not made at or near the border but 72 miles north of it. *Id.*

The court then held that probable cause was required to justify the search.

The issue next came before the Ninth Circuit in 1963 in *Fernandez v. U.S.,* 321 F.2d 283 (9th Cir. 1963), which concerned a stop, interrogation and search at a *permanent* checkpoint. The court first found 8 U.S.C. §1357 to be constitutional on its face and held the stop and interrogation valid without cause. This did not end the matter for the *Fernandez* court, which found it necessary to further determine "whether the search conducted after the car had been stopped was illegal." In order to answer that question, the court, citing *Carroll v. U.S., supra,* applied the following basic doctrine:

> It is well settled that a valid search of a vehicle moving on a public highway may be had without a warrant, if probable cause for the search exists . . ." *Id.*

The search was held legal because after the stop but before the search, the officer smelled marihuana, which provided him with cause.

Similarly, in *Renteria-Medina v. U.S.,* 346 F.2d 853 (9th Cir. 1965), the court, after validating a stop without cause, found it necessary to determine if probable cause existed for the search.

The above cases make it clear that the rule initially developed permitted stops and interrogations without cause but required cause for a search. Any governmental claim that it has relied upon long standing judicial approval of permanent checkpoint searches without cause is without merit.

b. Commencing in 1970, the Ninth Circuit seriously deviated from its previous position and held valid not only immigration stops and interrogations but also searches without cause away from the border. *U.S. v. Miranda,* 426 F.2d 283 (9th Cir. 1970); *Fumagalli v. U.S.,* 429 F.2d 1011 (9th Cir. 1970). Dicta to the same effect appeared in other cases (in which cause was clearly present before a search took place) *see e.g., Duprey v. U.S.,* 435 F.2d 1276 (9th Cir. 1970). However, *certiorari from this Court was not sought in any of these cases,* nor had it been sought in any prior case where a search took place without cause away from the border.

The very next year, in 1971, the Ninth Circuit decided *Almeida-Sanchez v. U.S.,* 452 F.2d 459 (9th Cir. 1971). Certiorari was sought and granted.

Any governmental claim of long reliance on precedent or approved practice is clearly fictitious, for the doctrine allegedly relied upon by the government enjoyed a life-span of one year. This Court granted certiorari and held such no-cause searches unconstitutional at the first opportunity available to it.

Further, reference to this Court's review powers demonstrates the fundamental weakness of the argument that lower federal court activity can determine how this Court's decisions shall be applied. This Court cannot control which cases come to it; it must await a request for relief by certiorari or appeal. If this Court permits lower federal court behavior to dictate how Supeme Court decisions will be applied, and if significant but erroneous decisions are not sought to be reviewed by litigants, *then this Court will have lost control of the application of its decisions.*

c. It should be noted that the government had other indications that its no-cause search policy would not pass continued close scrutiny.

Several immigration searches came before the Tenth Circuit, which, despite the deviation of the Ninth Circuit, held that stops and interrogations at permanent checkpoints were legal without cause, but examined the facts to determine if probable cause existed for the searches. *Roa-Rodriquez v. U.S.*, 410 F.2d 1206 (10th Cir. 1969); *U.S. v. Anderson,* 468 F.2d 1280 (10th Cir. 1972); *U.S. v. McCormick,* 468 F.2d 68 (10th Cir. 1972).

Lastly, the Ninth Circuit has continually required that customs searches away from the border be premised on reasonable suspicion of some nexus with international travel and some smuggling activity. *Cervantes v. U.S.*, 263 F.2d 800 (9th Cir. 1960); *Alexander v. U.S.*, 362 F.2d 379 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966). The similarity between the functions of customs and immigration officials should have put the

government on notice that its no-cause search practice was unconstitutional.

In summary, then, the doctrine now being applied by the Court is not new; no long standing rule supporting the government's position has ever existed, either in this Court or in the Ninth Circuit (which court, in any event, would not control); any reliance claimed by the government is at least seriously misplaced and at worst nonexistent. Thus, the cases before this Court simply do not present any proper question of "retroactivity", and the appropriate doctrines must be applied to all cases still on review.

E.

Any rule limiting application of the constitutional doctrines of this Court must be carefully applied only where absolutely necessary. A declaration of non-retroactivity results in persons who are similarly situated being subject to unequal treatment by the Court. The litigant may be before the Court first solely because of luck or delay on other similar cases in the lower courts. As no record is made of this Court's certiorari conferences, no one can clearly evaluate why certain cases are chosen for review over others presenting an identical issue. To the extent that no sound reason exists for the choice, or none is discernable, this Court's actions are arbitrary.

Such arbitrary action, if it cannot be totally avoided, must be held to an absolute minimum. The reasons therefore go directly to the basis for this Court's authority. The justification for this Court's existence and the primary reason why it has continued to enjoy its

place as a co-equal branch of government is its firm adherence to principled adjudication. *Desist v. U.S.*, 394 U.S. 244 (Harlan, J., dissenting) The force behind the acts and decisions of the Court is fundamentally a moral force. To the extent that persons similarly situated do not receive equal treatment from this Court, its authority is undermined. Thus, a decision to apply doctrine to one case but not to another presenting the same issue can never be taken lightly by the Court. Such a decision should be reached only for the most compelling reasons. Those reasons are lacking here.

CONCLUSION

For the foregoing reasons, the judgment of this Court should be in favor of petitioner Bowen and *Amicus* Foerster.

Respectfully submitted,

ARTHUR WELLS, JR.,

Attorney for Amicus Curiae.

November 15, 1974.

(Appendix A Follows)

Appendix A

Appendix A

(Letterhead of
Law Offices
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
Telephone (213) 653-3303)
October 18, 1974

Arthur Wells, Jr., Esq.
Wells & Chesney, Inc.
125 Twelfth Street, #110
Oakland, California 94607

Re: U.S.A. v. Bowen; U.S.A. v. Foerster

Dear Art:

This letter will advise you that you have our permission and authorization to file an amicus curiae brief in U.S.A. v. Bowen on behalf of your client, Gilbert Bryant Foerster.

Your assistance will be most welcome.

Very truly yours.

/s/ Michael D. Nasatir
Michael D. Nasatir

MDN:dg

(Letterhead of
Office of the Solicitor General
Washington, D.C. 20530)
October 21, 1974

Arthur Wells, Jr., Esq.
Wells & Chesney, Inc.
125 Twelfth Street - Suite 110
Oakland, California 94607

Re: Bowen v. United States
No. 73-6848, October Term 1974

Dear Mr. Wells:

In response to the request in your letter of October 15, I hereby consent to your filing a brief amicus curiae in the above-captioned case.

Sincerely,
/s/ Robert H. Bork
Robert H. Bork
Solicitor General